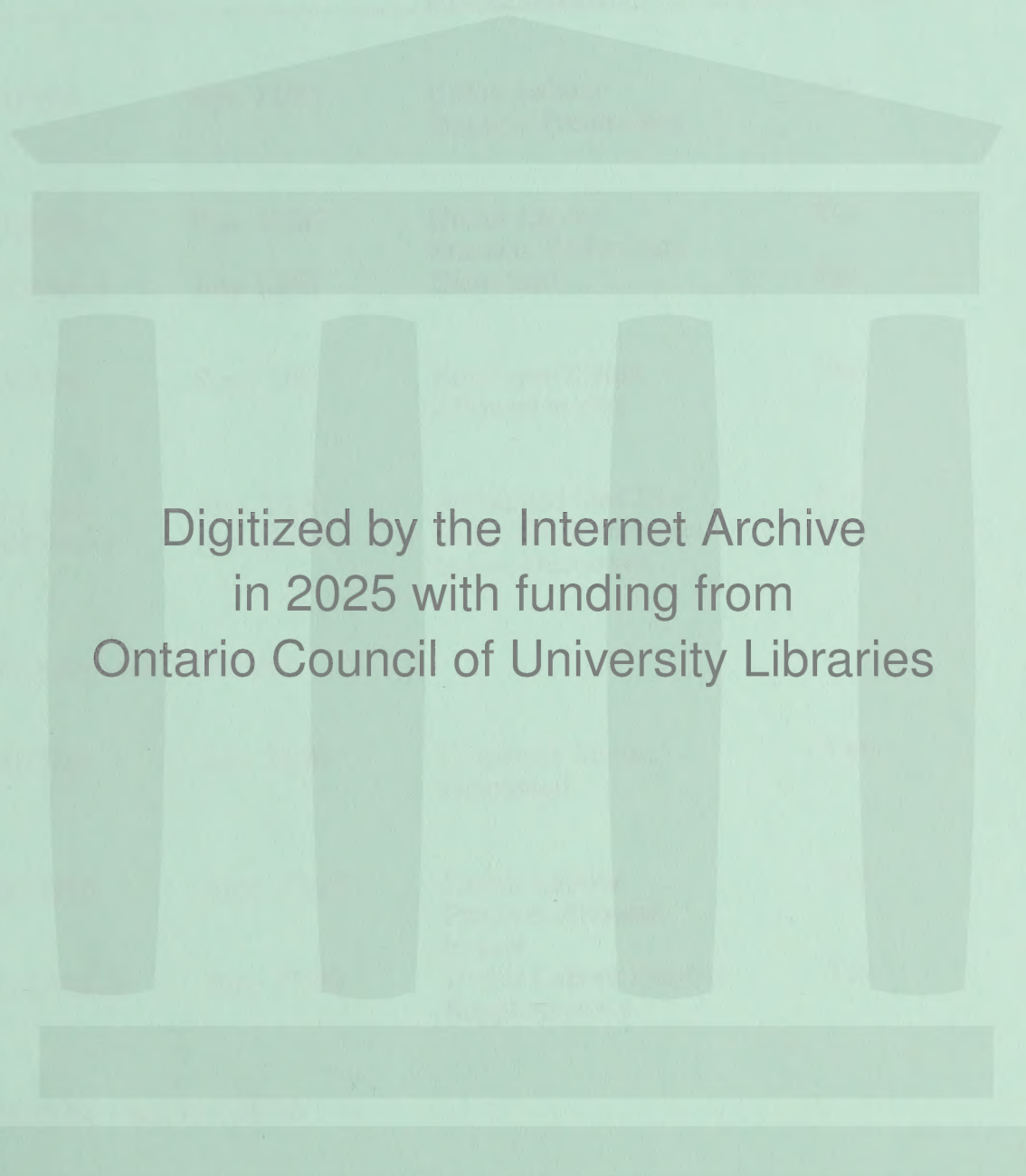


**ONTARIO PUBLIC SERVICE
LABOUR RELATIONS TRIBUNAL
DECISIONS**

TRIBUNAL DECISIONS

1986



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ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1986

File No.	Date	Type and Disposition	Indexed
T/0003/86	Feb. 11/87	Unfair Labour Practice; Preliminary	Yes
T/0008/86-1	Feb. 19/87	Unfair Labour Practice; Preliminary	Yes
T/0008/86-2	July 10/87	Dismissed	Yes
T/0013/86	Sept. 8/88	Employee Status; Allowed in part	Yes
T/0015/86	Feb. 16/87	Adjourned Sine Die	No
T/0015/86-2	Jan. 19/90	Duty of Fair Representation; Dismissed	Yes
T/0018/86 - see T/0064/84			
T/0027/86	July 24/87	Employee Status; Dismissed	Yes
T/0028/86	Sept. 23/87	Unfair Labour Practice; Allowed in part	Yes
T/0028/86-2	June 27/89	Unfair Labour Practice; Supplementary	Yes
T/0029/86 - see T/0028/86			
T/0034/86	Dec. 30/87	Bargaining Authority; Allowed in part	Yes
T/0037/86-1	July 3/87	Unfair Labour Practice; Preliminary	Yes
T/0037/86-2	Dec. 2/87	Dismissed	Yes



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T/0003/86

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

The Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Ontario Public Service Employees Union
(John Waggoner)

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Correctional Services et al.)

Respondents

BEFORE:

J.H. Devlin
D. Bonazzo
R. Drennan

Vice-Chairman
Member
Member

FOR THE COMPLAINANT:

J. Miko
Grievance Officer
Ontario Public Service Employees Union

FOR THE RESPONDENTS:

J. Zarudny, Esq.
Counsel
Crown Law Office, Civil
Ministry of the Attorney General

HEARING DATE:

October 24, 1986

DECISION

The complaint, in this case, is dated March 20, 1986 and involves an allegation that the Ministry of Correctional Services and a number of individual respondents who are members of management with that Ministry have dealt with John Waggoner, a Correctional Officer, in a manner contrary to the provisions of Sections 29(1) and 29(2) of the Crown Employees Collective Bargaining Act. At the hearing, the Tribunal was advised that the focus of the complaint is Section 29(2)(a) of the Act and this, together with Section 29(1), provide as follows:

"29(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

...

29(2) The employer or any person acting on behalf of the employer shall not,

(a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is not a member of an employee organization;"

By way of relief, the complaint requests that Mr. Waggoner be placed in a comparable position to that which he presently holds

with the Ministry of Correctional Services. The complaint further requests general damages, compensation for lost wages as a result of time off work due to mental distress and an order requiring the Ministry to cease and desist from engaging in discriminatory acts against Mr. Waggoner.

It is to be noted that Mr. Waggoner is not actively at work at the present time. In the spring of 1985, he became ill and qualified initially for short-term and, subsequently, for long-term disability benefits. It is the position of the Complainant that due to harassment practiced by the Respondents, Mr. Waggoner was compelled to resign from his position as Chief Steward in mid 1984 and that this harassment also caused Mr. Waggoner to become ill with the result that he was unable to attend work and qualified for disability benefits.

In the body of the complaint, it is alleged that, at all material times, Mr. Waggoner was a member of the Executive of Local 521 and that he "was harassed, intimidated and coerced as a result of his position in the Union, for his filing of grievances and for issuing complaints of unprofessional conduct against certain officers, both within and out of the Bargaining Unit". The complaint then lists seven incidents spanning the period from January of 1982 to April of 1985. In the final paragraph of the complaint, the incidents listed are specified to be examples of harassment but not intended to be exhaustive.

At the outset of the hearing, Mr. Zarudny, on behalf of the Respondents, raised a number of preliminary matters. The first of these and, in fact, the main focus of Mr. Zarudny's submission was that Mr. Waggoner had launched grievances in respect of many of the incidents set out in his complaint. These grievances were dealt with on their merits and Mr. Zarudny submitted that Mr. Waggoner ought not to be able to come before the Tribunal and rely upon these same incidents in support of his claim that the Respondents have acted in a manner contrary to Sections 29(1) and 29(2)(a) of the Crown Employees Collective Bargaining Act. It was the position of Mr. Zarudny that Mr. Waggoner litigated his grievances in another forum and that many were settled or resolved to his satisfaction and were not pursued further. In these circumstances, the Employer was entitled to believe that these matters had been finally disposed of. On the grounds of res judicata, issue estoppel and abuse of process, Mr. Zarudny requested that we dismiss the complaint at this stage.

Related to Mr. Zarudny's initial submission was his alternate contention that there has been an undue delay in processing the complaint and that the common law doctrine of laches ought to apply so as to disentitle the Complainant to a hearing on the merits. While acknowledging that there is no time limit for filing complaints of this nature set out in the Crown Employees Collective Bargaining Act, Mr. Zarudny pointed out that the initial incidents relied upon in the complaint date back to 1982. Mr. Zarudny's suggested that the Employer would be

severely prejudiced by now having to respond to such complaints. Mr. Zarudny also pointed out that, on two occasions in 1984, in replying to correspondence from the Employer on the subject of his attendance, Mr. Waggoner stated that he was being harassed. At least as early as 1984, therefore, Mr. Zarudny submitted that Mr. Waggoner was of the view that the Ministry's conduct constituted harassment and that he delayed unnecessarily by not pursuing a complaint under the Crown Employees Collective Bargaining Act until the spring of 1986.

Apart from the general arbitrability of the complaint, Mr. Zarudny also advanced a number of submissions with respect to the individual allegations set out in the complaint. Firstly, it was contended that "issuing complaints of unprofessional conduct against certain officers, both within and out of the Bargaining Unit" does not involve the exercise of a right under the Crown Employees Collective Bargaining Act and, as a result, even if the Employer's response to such conduct was found to be improper, this would not constitute a violation of Section 29(2)(a) of the Act. Mr. Zarudny further pointed out that the Regulations to the Act require that the Complainant set out the material facts upon which it relies as constituting improper conduct and, on this basis, Mr. Zarudny submitted that the Complainant ought to be precluded from relying upon incidents other than those specifically addressed in the complaint form. Finally, if the matter were to proceed on its merits, Mr. Zarudny requested that we instruct the Complainant to provide particulars

of the Sections of the Act alleged to be violated in respect of each incident to which reference is made in the complaint.

In response to the submissions of Mr. Zarudny, it was the position of Ms. Miko, on behalf of the Complainant, that the Tribunal ought not to dismiss the complaint on the basis of res judicata, issue estoppel or abuse of process. Ms. Miko contended that the complaint does not involve an attempt to relitigate earlier grievances but that a review of the grievance record is necessary to demonstrate a pattern of "grievance and retaliation" in contravention of Section 29 of the Crown Employees Collective Bargaining Act.

With regard to the matter of delay, Ms. Miko submitted that the Respondents did not raise any objection to the complaint on the grounds of delay until one week prior to the hearing and, on this basis, suggested that it has now waived its right to do so. Ms. Miko also pointed out that there are no time limits contained in the Act and requested that we consider that the Complainant was absent from work for some period on both Short-Term and Long-Term Disability Benefits. Ms. Miko submitted that it is common to have hearings delayed for a number of years and that there was no evidence that the Respondents would be prejudiced by any delay in this case. Ms. Miko further contended that the complaint addresses a number of events and suggested that it is not clear at what point there was sufficient evidence

to demonstrate that Mr. Waggoner was being dealt with in a manner contrary to the Crown Employees Collective Bargaining Act.

In response to Mr. Zarudny's remarks concerning the issuing of complaints of unprofessional conduct by Mr. Waggoner, it was the submission of Ms. Miko that such complaints set the stage for a reaction on the part of management and, to this extent, are relevant to the Tribunal's determination. Ms. Miko also pointed out that the complaint itself indicates that the incidents set out are examples of harassment only and, for this reason, it was contended that the Complainant ought to be permitted to adduce additional evidence in support of the alleged violation of Sections 29(1) and 29(2)(a) of the Crown Employees Collective Bargaining Act. With respect to the incidents already set out, however, Ms. Miko submitted that sufficient information is contained in the complaint and that no further particulars are necessary.

In conclusion, Ms. Miko requested that we dismiss the preliminary objections advanced by the Respondents. Alternatively, Ms. Miko requested that we reserve our decision on these objections and proceed with the hearing on the merits. Ms. Miko suggested that it would be difficult to fairly assess the objections at this juncture.

At the conclusion of argument by both Counsel on the preliminary matters, the Tribunal was advised that if the

complaint were to proceed on its merits, it was anticipated that approximately ten days of hearing would be required. In these circumstances, it is particularly important that a proper foundation for the complaint be established. If such a foundation exists, the Complainant is entitled to proceed on the merits. In the absence, however, of a statement of material fact which, if proven, could constitute a violation of the Crown Employees Collective Bargaining Act, there is no basis for the complaint and it must be dismissed. The Tribunal will not entertain proceedings which constitute no more than a fishing expedition or a relitigation of grievances dealt with in another forum.

We turn then to the individual incidents set out in Paragraph 4 of the complaint and to the focus of the complaint which is the alleged violation of Section 29(2)(a) of the Crown Employees Collective Bargaining Act. This section provides that the employer or any person acting on behalf of the employer shall not refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising a right under this Act or is or is not a member of an employee organization.

The final incident to which reference is made in Paragraph 4 of the complaint provides as follows:

"On or about March or April 1985, a grievance was submitted in respect of vacation time. During this period, I was advised that they were thinking of dismissing me, and I was told by Mr. Wallen, a Personnel Officer for the Ministry of Correctional Services, that I had a wife and two children, and even though I would win a dismissal case in arbitration, how would I support them in the months of waiting for the case to come up."

As is clear from this aspect of the complaint, in the spring of 1985, Mr. Waggoner submitted a grievance with respect to vacation time. We were advised by Ms. Miko that this grievance has not been heard by the Grievance Settlement Board and, at the present time, is being held in abeyance. In these circumstances, Mr. Zarudny contended that to allow Mr. Waggoner to proceed would enable him to have the benefit of a hearing of this grievance both before the Grievance Settlement Board and before the Tribunal. We agree with Mr. Zarudny that this would be inappropriate as it is not the mandate of the Tribunal to hear individual grievances arising under a collective agreement. At the same time, Mr. Waggoner's complaint alleges that there was a threat to dismiss him during the period of time in which his grievance was filed. At the moment, however, it is not alleged that the threat of dismissal was a direct response to the grievance filed and the coincidence alone in time is not sufficient to constitute a violation of Section 29(2)(a) of the Crown Employees Collective Bargaining Act.

The next incident to be considered is the following:

"On or about October 9th, 1984, the grievor received an attendance letter from Superintendant Simmons shortly after testifying on behalf of a grievor against the Ministry."

Although it is not alleged in the complaint, it is conceivable that this incident could, if properly framed, constitute a violation of Section 37(1) of the Crown Employees Collective Bargaining Act which provides for the protection of witnesses' rights. Again, however, in its present form, this aspect of the complaint involves neither an alleged violation of Section 29(2) nor of Section 37(1) of the Act.

The next incident which we propose to consider is the first incident set out in the complaint which dates back to January of 1982. This is as follows:

"As a result of having written up an officer for unprofessional conduct on or about January 26th, 1982, the grievor was ordered by Mr. Loran to work overtime. When it was explained to Mr. Loran that the grievor had just finished his seventh midnight shift in a row and would not last through the day shift, as the grievor was dead tired, had an upset stomach, and having been outside all night doing outside patrol, now being placed in a warm building would put the grievor to sleep. Mr. Loran advised the grievor that he, Mr. Loran, had made his decision, and that the grievor would have to abide by it. The grievor, seeking relief, attended at the Health Centre, when he was given Gravol. The grievor notwithstanding that he had advised Mr. Loran of an upset stomach, had been ordered to the breakfast line, where due to the smell of food and as a result of the heat, the grievor became more nauseated. The grievor attended at the Health

Clinic, and after conferring with the Health Unit, informed Mr. Loran that he would be leaving Shift due to illness. The grievor was disciplined. It is to be noted that there were a number of people on the first Shift with the grievor, who wanted to work overtime."

The requirement for Mr. Waggoner to work overtime in January of 1982 was the subject of a grievance as were a number of letters issued by the Ministry as a result of the Complainant leaving his shift on that occasion. It would appear that in the end result no discipline was imposed and the grievances were not pursued any further.

Although Mr. Zarudny alleged that this initial aspect of the complaint is simply an attempt to have the Tribunal entertain grievances which have long since been resolved, it is unnecessary to make any determination in this regard. Issuing complaints of unprofessional conduct does not appear to involve the exercise of a right under the Crown Employees Collective Bargaining Act such that the Ministry's response could constitute a violation of Section 29(2)(a).

There are two further incidents outlined in Paragraph 4 of the complaint which, in our view, are subject to the same deficiency. The first of these incidents is as follows:

"On February 10th, 1982, the grievor received from Mr. Loran an appraisal for August 13th, 1980 to December 31st, 1981. This was an appraisal spanning a seventeen month period. This is unusual as appraisals usually cover a six-month period. In

addition, this appraisal overlapped two other appraisals. This appraisal was grieved, and management two days' before hearing, withdrew this appraisal, which was clearly meant to be coercive (sic) in nature. At that time, Mr. Loran advised the grievor that another appraisal had been put on the grievor's file, but was not made available to the grievor. This next appraisal was of a (sic) negative nature than the first."

Grievances were launched by Mr. Waggoner in respect of both appraisals and the grievance in relation to the second appraisal resulted in a hearing before the Grievance Settlement Board. In a decision dated March 2, 1984, the Board directed that the satisfactory rating accorded to the grievor on the revised appraisal be retained but that certain general comments accompanying the appraisal which did not reflect a satisfactory level of performance be removed from the Grievor's personnel records. In making this order, the Board noted that there was no evidence of bad faith on the part of the Ministry in the preparation of the revised appraisal nor in the Board's opinion did Mr. Loran, the author of the appraisal, bear any malice toward Mr. Waggoner.

The other incident which also resulted in the filing of a grievance is described in the complaint in the following manner:

"On March 29th, 1984, the grievor received an attendance letter which threatened to dismiss the grievor. The grievor received said letter from Superintendent Simmons. Said letter was grieved, and alterations in same took place."

As can be seen, Mr. Waggoner filed a grievance in response to the attendance letter of March 29, 1984. This grievance was ultimately resolved with some alterations being made to the initial letter and Mr. Waggoner was given an opportunity to submit a letter in reply.

Although, at the hearing, Ms. Miko spoke in terms of "grievance and retaliation" in respect of the incidents outlined, the Tribunal is not being asked to consider the Employer's conduct in response to the grievances filed but instead, the complaint makes reference to the events giving rise to the grievances. These events were the subject of grievances which were resolved or dealt with by the Grievance Settlement Board and it is not for this Tribunal to review the merits of those grievances. In addition, the fact that the Ministry responded to a number of Mr. Waggoner's grievances in a manner which led to their resolution does not, in itself, involve "retaliation" as suggested by Ms. Miko nor conduct proscribed by Section 29(2)(a) of the Crown Employees Collective Bargaining Act.

The final two incidents to which reference is made to Paragraph 4 of the complaint are as follows:

"On February 2nd, 1984, the grievor was verbally and physically assaulted by Mr. Quinn, who is classified as an OM 15, and a Supervisor of the grievor. The (sic) submitted an Occurrence Form on the assault, and met with Mr. Aird, the Assistant Superintendant.

...

On March 13th, 1985, the grievor, as a result of harassment by Messrs. Quinn and Elliott, was forced to book off sick due to frayed nerves."

While these incidents were not the subject of grievances on the part on Mr. Waggoner, it was the position of Mr. Zarudny, on behalf of the Respondents, that given the time at which these events occurred, the Respondents were entitled to assume that if any claim existed, this had long since been abandoned as a result of Mr. Waggoner's failure to act expeditiously.

Leaving aside, for the moment, the matter of delay, the incidents described do not involve allegations that the Respondents engaged in conduct proscribed by the Crown Employees Collective Bargaining Act in response to Mr. Waggoner exercising a right under the Act or because he was a member of the Union. The fact that Mr. Waggoner may believe he was being harassed is not sufficient, in itself, to constitute a violation of Section 29(2)(a) of the Act.

Apart from the specific incidents in Paragraph 4, there are a number of allegations in the complaint which suggest a violation of Section 29(1) of the Crown Employees Collective Bargaining Act. As set out previously, this Section provides that no person acting on behalf of the employer shall interfere with the administration of an employee's organization or the representation of employees by such organization. Nothing in

the Section, however, is deemed to deprive the employer or anyone acting on the employer's behalf of freedom to express his views as long as he does not use coercion, intimidation, threats, promises or undue influence. While Ms. Miko also made reference to Section 29(1) during the course of the hearing, the material facts upon which the Complainant relies in support of its allegation are not clearly particularized.

As is evident, there are a number of deficiencies in the complaint in its present form. We propose, however, to permit the Complainant an opportunity to make clear the material facts upon which it relies in support of its allegation that the Respondents engaged in a violation of Section 29(1) of the Crown Employees Collective Bargaining Act. We shall also permit the Complainant an opportunity to amend the complaint in respect of the alleged violation of Section 29(2)(a).

We wish to make it clear to the parties, however, that only in the event that any amended complaint contains statements of material fact, action, or omission which could, if proven, establish conduct proscribed by the Crown Employees Collective Bargaining Act will the complaint be heard on its merits.

Although the Regulations to the Act provide that no evidence shall be adduced in respect of a material fact not included in an application or complaint, it is clear that this is

in the discretion of the Tribunal and, in addition, the complaint, in this case, also provides that the incidents set out in Paragraph 4 are not intended to be exhaustive. As a result, the Complainant shall also be provided with an opportunity to set out in its amended complaint, all incidents upon which it seeks to rely. In respect of each and every incident said to involve a violation of the Crown Employees Collective Bargaining Act, the Complainant shall include a reference to the Section or Sections of the Act alleged to have been violated.

The Complainant shall have a period of thirty days from the issuance of this Decision to amend its complaint and to provide the particulars specified. Thereafter and prior to proceeding to hear the merits of the complaint, the Respondents shall be given a further opportunity to make preliminary objections in respect of the amended complaint. Although we make no finding at this time with regard to the matter of laches, we note that it was only in October of 1986, more than six months after the complaint was filed, that the Respondents raised any objection to the complaint on this ground. In addition, at this juncture, the Respondents have not demonstrated the type of prejudice which is critical to support an application to dismiss the complaint on the grounds of delay. In view of the opportunity provided to the Complainant to amend the complaint, however, the Tribunal will also permit the Respondents an

opportunity to renew their objection to the complaint on this basis.

DATED AT TORONTO, this 11th day of February , 1987.

Jane H. Devlin
Jane H. Devlin, Vice Chairman
for the Tribunal



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T/0008/86

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O., 1980, c. 108

THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Ontario Public Service Employees Union

Complainant

- and -

Killian and The Crown in Right of Ontario
(Ministry of Transportation and Communications)

Respondent

BEFORE:

M.G. Mitchnick, Alternate Chairman
M.J. Sullivan, Member
R.M. Drennan, Member

FOR THE COMPLAINANT:

J. Miko
Grievance Officer
Ontario Public Service Employees Union

FOR THE RESPONDENT:

S.A. Currie
Staff Relations Officer
Human Resources Secretariat

HEARING DATE:

December 1, 1986

•
DECISION

This is a complaint under section 32 of the Crown Employees Collective Bargaining Act, alleging that the grievors have been dealt with contrary to the provisions of section 29(2) (a) and (c) and of section 37(1)(c) and (d). These sections provide:

29.-(2) The employer or any person acting on behalf of the employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;

...

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; ...

37.-(1) The employer or any person acting on behalf of the employer shall not,

- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

At the hearing the potential application of section 29(1) of the Act was discussed as well. That section provides:

29.-(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The allegation in essence is that the positions of the grievors were downgraded as a result of a grievance filed by employees at another Ministry of the government. That grievance pointed to the then-current classification of the present grievors as the basis of a "usage" argument. The present complaint alleges that the intent of the employer in taking the action that it did was to discourage employees from exercising their rights to grieve under the Act. The respondent concedes that the matter can go forward and the factual issues be dealt with under section 37 of the Act, but argues that the events complained of in this case do not precisely fit within the language of section 29. The respondent asks as a preliminary matter, therefore, that the section 29 aspects of the case be struck from the complaint.

This is the sort of allegation which goes to the root of the collective-bargaining scheme protected by the Act, and the Tribunal would have to be persuaded after the fullest consideration that the Act was drafted in such a way so as not to apply.

Without making any final determination, we think that it is at least arguable, looking at both sections 29(1) and (2) of the Act, that section 29 could apply, and on that basis alone it might be an appropriate case to decide the point only after all the evidence has been heard and the facts can be placed more clearly in relief. Beyond that, however, the respondent here has conceded that the whole case can go forward under section 37, and we see little difference on the admissibility of relevant evidence in having the case proceed in that way. It is not apparent, therefore, that there is any real prejudice to the respondent, or to the parties generally, in the Tribunal deferring the determination of the application of section 29 until the conclusion of the case.

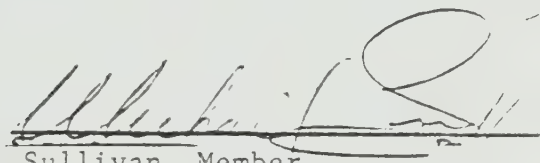
With respect to deferral to arbitration, the issue here is motive, which may not be a particularly relevant consideration at arbitration. The nature of the issue, therefore, together with the nature of the allegation (as discussed above) makes this case an appropriate one for the Tribunal to decide.

We recognize the interest of the respondent in seeking some guidance from the Tribunal for the future with respect to the application of section 29, but in the circumstances we find it appropriate to hear the evidence in the case and to allow all of the legal issues to be addressed in full by the parties at the conclusion of the case. The preliminary motion is accordingly dismissed.

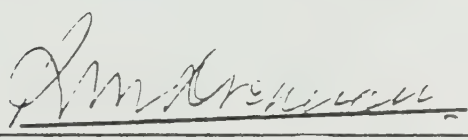
The matter is referred to the Registrar for continuation of hearing.

DATED at Toronto, Ontario, this 19 day of February 1987.

M. G. Mitchnick
Alternate Chairman



M.J. Sullivan, Member



R.M. Drennan, Member



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Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0008/86

BETWEEN:

Ontario Public Service Employees
Union

Complainant,

- and -

Killian and The Crown in Right of
Ontario (Ministry of Transportation and
Communications)

Respondent

BEFORE:

M. Mitchnick, Alternate Chairman
M. Sullivan, Member
R. M. Drennan, Member

FOR THE COMPLAINANT:

J. Miko
Grievance Officer
Ontario Public Service Employees
Union

FOR THE RESPONDENT:

S. Currie
Staff Relations Officer
Staff Relations Branch
Human Resources Secretariat

HEARINGS:

December 1, 1986
May 11, 1987
May 12, 1987
May 25, 1987

DECISION

This is a complaint under section 32 of the Crown Employees Collective Bargaining Act, alleging that the respondents have acted in contravention of sections 29 (1), 29 (2) (a) and (c), and 37 (1) (c) and (d) of the Act. Those sections read:

- 29 (1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
- (2) The employer or any person acting on behalf of the employer shall not,
- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization...
 - (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act...
- 37 (1) The employer or any person acting on behalf of the employer shall not,
- (c) discriminate against a person in regard to employment or a term or condition of employment;
or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

The complaint pertains to a downgrading of certain individuals employed as Microfilm Operators by the Ministry of Transportation and Communications in its Licensing and Control office in Kingston. Critical to the perception behind this complaint, however, was the filing in February of 1985 of grievances relating to the Kingston offices of another Ministry, being the OHIP office of the Ministry of Health. Those grievances asserted that Microfilm Operator "2"s in the OHIP office should properly be classified at the higher "3" level, and in support of that assertion a primary focus of the grievances was a "usage" argument that employees doing similar work in the Ministry of Transportation and Communication Licensing office in Kingston were classified as "3"s. OPSEU's staff representative handling that grievance, Mike Campbell, was understandably concerned, therefore, when subsequent to discussion of these OHIP grievances with the Ministry of Health he began receiving calls from officers of the MTC Local that the Microfilm Operator 3's in their area were undergoing a process of review to ascertain whether they were correctly classified. Mr. Campbell attempted unsuccessfully to ascertain from management at the MTC the source of this review, and when management, despite Mr. Campbell's expressed concern over the "coincidence" of the timing, proceeded at the end of 1985 to downgrade the MTC positions to the "2" level, the present complaint was filed.

Notwithstanding that speculation on the part of Mr. Campbell and the employees in the Licensing Control Office that, in view of this timing, the initiation of the review of the Microfilm Operators' classification in the MTC office was directly connected to the usage-based grievances in the OHIP office, the MTC has in fact established before us a well-documented chronology of the events giving rise to its review which clearly pre-dates the raising of the "usage" argument at OHIP as an issue, or even the filing of the OHIP grievances. We feel compelled to express our surprise and concern, however, that the documentation which so amply substantiates the Ministry's case was, we were advised, not at any time made available to the Union for its consideration during any of the various forms of pre-hearing discussion of this matter between the parties. Nor we understand, were these documents produced to the Union during the normal process under which the Tribunal assigns one of its Settlement Officers to assist the parties to gain a fuller sense of each other's position, in order to facilitate a possible resolution of the matter short of litigation. Instead, as we are advised, it was only after 4 days of hearing and a multitude of witnesses (most of whom had to travel from Kingston) that the Union had before it the documents which on their very face provided a complete answer to the complaint on its facts.

Those documents, together with the elaboration of the Ministry's witnesses, demonstrate that the MTC's review of its Microfilm Operators emanated from a concern registered with Human Resources by a Unit Head, T. M. Campbell, in the MTC's Information Management Office in Downsview that Operators in his office appeared to be doing more demanding work than Operators in the Transportation Regulation Operations Division at both Downsview and Kingston but were classified lower. Mr. Campbell's memo of November 22, 1984, reads:

To: Mr. A. S. Mitchell
Manager
Human Resources and
Admin. Services
1st Floor, West Tower

Date: 1984-11-22

Re: Classification of Microfilm Operators
in Information Management Office and
Transportation Regulation Operations Division

The Supervisor of Microrecord Services (Information Management Office), Mrs. Pat Guerin, has expressed concern to me regarding an apparent disparity between the classification of microfilm operators in Information Management Office and those in Transportation Regulation Operations Division (Downsview and Kingston). Specifically, Mrs. Guerin has noted that the T.R.O.D. operators are classified at the "3" level, but do less demanding work than I.M.O. operator 2's, and, most significantly, do not operate precision planetary cameras which is the essence of the "3" class standard.

Needless to say, awareness of this disparity has caused a considerable degree of upset and hard feelings on the part of the I.M.O. Operator 2's.

I am requesting, therefore, that your office undertake an audit of the two filming operations, and further request that you advise me of the options available for resolving the disparity.

Attached you will find a copy of the job specification for the Operator 2's in this office. I believe that this specification accurately reflects the duties and functions currently performed.

Thank you for your attention to this matter.

(signature)

T. M. Campbell
Head
Information Analysis
and Development Section
Information Management Office

Mr. Mitchell wrote back on November 30, 1984, as follows:

To: T. M. Campbell Date: 84 11 30
Head, Information Analysis
and Development Section

From: Human Resources Planning
and Services Branch

Re: Classification of Microfilm Operators

In response to your request for an audit of the microfilming operations in the Information Management Office and the Transportation Regulation Operations Division, this is to advise that a review has been undertaken by the Classification and Pay Administration Office.

Joan Crowther and Joanne Hearst, the Classification and Pay Administration Officers who are conducting the review, will contact you by December 31, 1984 to advise of its' status.

If you have any questions, please feel free to give either Joan or Joanne a call at 3955.

(signature)

A. S. Mitchell
Manager,
Human Resources and
Administration Services Office

As Mr. Mitchell's reply notes, Joan Crowther of the Ministry's Human Resources office was put in charge of the review project, and Ms. Crowther testified that she asked Ms. Hearst to put together a preliminary plan of action, and that plan (filed with the Tribunal) was ready by December 4, 1984. Contact was then made in early January with Dina Palozzi, the Director of the Licensing and Control Branch in Kingston, to advise her that the review process of Microfilm Operator 3's was being initiated, and to outline the assistance requested, in the following terms:

Mrs. D. A. Palozzi 85 01 07
Director,
Licensing and Control Branch

FROM: Human Resources Planning
and Services Branch

RE: Microfilm Operators

We have been requested to undertake a review of the class usage of the Microfilm Operator series. In order to assist us with our review, the information listed on the attached form is required. To facilitate completion of this form, we have indicated the applicable positions in your area.

Would you return the completed form to Joanne Hearst, Classification and Pay Administration Officer, by February 8, 1985. If you have any questions, do not hesitate to call Joanne at 248-3955.

Your assistance with this review is greatly appreciated.

(signature)

A. S. Mitchell
Manager,
Human Resources and
Administration Services Office

Through the forms referred to, and discussions with supervisors, together with a study of the central files on the classification of Microfilm Operators across the Public Service, Ms. Crowther and Ms. Hearst were able to formulate some conclusions and recommendations, and their report was tabled and discussed at a meeting with senior level management in Downsview on April 30, 1985. Because the Union in argument sought to put a more equivocal cast on that Report than we think can fairly be justified, it is appropriate to set out the text of Ms. Crowther's report in full:

BACKGROUND

A review of the microfilming operations in the Information Management Office (I.M.O.) and the Transportation Regulation Operations Division was requested by T. Campbell, Head, Information Analysis on November 22, 1984. In his letter of that date to Mr. A.S. Mitchell, Mr. Campbell stated that "the T.R.O.D. Operators are classified at the "3" level, but do less demanding work than I.M.O. Operator 2's and, most significantly, do not operate precision planetary cameras which is the essence of the "3" class standard".

Possible changes of organizational structure in I.M.O., to Merge Operator 2 and 3 responsibilities have, at various times in the past, been discussed with T. Campbell. He advised he does not wish to change organization structure/functional flow to address this problem but does wish to have classification equity with Licensing and Control positions.

Joanne Hearst and Joan Crowther, Classification and Pay Administration Officers undertook the review. Their methodology, findings, conclusions, options and recommendations are outlined in this report.

METHODOLOGY

1. Review Class Standards.
2. Review positions involved.
3. Gather additional information via survey form (Appendix A) and discussion with Supervisor.
4. Review class usage in OPS.

FINDINGS AND CONCLUSION

All Microfilm Operator 2 and 3 position specifications in the Ministry were reviewed and although they outlined the duties and responsibilities of each position, additional information was requested to ensure completeness and consistency of data. The supplementary information indicated, in some cases, differences between the data in the position specifications and the current duties of the position. Appendix B (attached) incorporates information contained in both the position specifications and the survey form and the key points are listed below:

A) Class Standards

The Operator 2 Microfilm is responsible for operating elementary microfilm equipment, not involving high precision. The Operator 3 Microfilm is responsible for operating planetary equipment requiring a high degree of precision and skill. The Operator 3 films a variety of documents different in shape, size, colour and condition. They adjust light, voltage, aperture focus, may employ a densitometer and take exposure readings. The Operator 2 operates a reader/printer, cleans equipment and may operate auxiliary equipment such as editing and splicing equipment. The Operator 3 is responsible for minor maintenance and may develop film. Reference Appendix B.

B) Information Management Office

Position #6211-60 Operator 2 Microfilm (2 Incumbents)

Although position operates planetary equipment (5%) and performs minor maintenance, the majority of time is spent in operating elementary camera. Position also operates other equipment e.g. readers, splicers.

Conclusion

Position appears properly classified based on comparison against standard.

Position #6211-58 Operator 3 Microfilm (2 incumbents)

Operates precision planetary cameras and table top planetary cameras 45% of time. Develops film 30% of time (develops film for Licensing and Control Branch).

Conclusion

Position appears properly classified based on comparison against standard.

C) Licensing and Control Branch

Position #7501-38 Operator 3 Microfilm (6 incumbents/6 complement)

Although it is the intention to rotate staff (i.e. each incumbent works on cameras for a specific period of time), this is not occurring. Two incumbents operate cameras 100% of time. Five incumbents operate readers the majority of the time and operate splicing and editing equipment.

The camera used is the Kodak Oracle and although it is called a planetary camera no adjustments are made. Operator turns on machine and films good quality 8½ X 11" correspondence.

Conclusion

Position does not appear to be properly classified based on comparison against standard. Even though table top "planetary" equipment is used, Operator 3 classification is very tenuous. Position is a better fit at the Operator 2 level.

Position #7511-21 Operator 3 Microfilm (2 incumbents)

Operates elementary camera 45% of time. Operates reader 40% of time.

Conclusion

Position does not appear to be properly classified based on comparison against standard. Existing classification was confirmed October 1984. Classification was designated as minimal at that time. Position would be a better fit at the Operator 2 level.

Position #7512-23 Operator 3 Microfilm (1 incumbent)

Operators elementary cameras 45% of time. Operates reader 40% of time. Specification indicates incumbents develop film (less than 15% of time).

Conclusion

Position does not appear to be properly classified based on comparison against standard. Even though position does develop film, this is not a significant percentage and the Operator 3 classification is therefore tenuous. Position would be a better fit at the Operator 2 level.

Position #7570-16 Operator 3 Microfilm (21 complement/4 incumbents)

Operates rotary cameras 70% of time. Operates reader 20% of time. Develops film 5% of time. Survey form indicates documents filmed differ in shape, size, quality and colour. Spec makes no reference to types of documents.

Conclusion

Position does not appear to be properly classified based on comparison against standard. Position does develop film but 5% is not a significant percentage. The Operator 3 classification is tenuous. Position would be a better fit at the Operator 2 level.

D) Class Usage OPS

Positions in the following ministries were reviewed: Colleges and Universities; Consumer and Commercial Relations; Health; Natural Resources; Solicitor General.

Operator 2 Microfilm

Thirteen position specifications were analysed. Major responsibility of twelve of the positions was operating elementary cameras. The other position has a major responsibility of indexing, inspecting and mounting film.

Conclusion

Overall positions appear appropriately classified based on comparison against standard.

Operator 3 Microfilm

Fourteen position specifications were analysed. Six positions divide the majority of time between operating various types of microfilming cameras (precision, table top planetary and elementary) and supervising staff; five positions operate planetary cameras the majority of the time one position spends a significant amount of time (30%) training staff and is responsible for developing film; two positions spend a majority of the time developing film.

Conclusion

Overall positions appear appropriately classified based on comparison against standard.

Summary

Operator 2 Microfilm position in Information Management office is properly classified. The duties and responsibilities inherent in that position, however, are comparable to the Operator 3 Microfilm positions in Licensing and Control.

Compared to standards positions in Licensing and Control at the Operator 3 level do not appear to be classified appropriately. They also are out of line with the application of standards in other Ministries.

OPTIONS

Option A

- Take no action.

Pros

- No impact on Licensing and Control positions.

Cons

- Potential grievances from Operator 2's in Information Management.
- Management in Information Management Office dissatisfied with review.
- Does not address the classification of positions in Licensing and Control.

Option B

- Reclassify position #6211-60, Information Management Office to Operator 3 Microfilm.

Pros

- Position would be classified on par with Licensing and Control positions.
- Employees in position would be satisfied.
- Management in Information Management Office would be satisfied that positions are on par with positions in Licensing and Control Branch.

Cons

- Relationship between position and standard would be distorted; potential impact on other Ministries.
- Relationship between this position and #6211-58, Operator 3 Microfilms (I.M.O.) would be distorted and may cause Operator 3's to seek reclassification to Operator 4, which is not supportable.
- Does not address the classification of positions in Licensing and Control Branch.

Option C

- Update Licensing and Control position specifications and reclassify positions in line with standards.

Pros

- Ensures that duties and responsibilities are accurately reflected and that positions are properly classified.
- Management in Information Management Office satisfied that review was properly conducted in a fair and honest manner.
- Relationship established between positions in Licensing and Control and Information Management.

Cons

- Potential reclassification of 4 positions to an Operator 2 Microfilm would result in the "red-circling" of 13 employees.
- Possibility of grievances from employees red-circled.
- Potential dissatisfaction of management in Licensing and Control Branch.

RECOMMENDATIONS

Option C - Update Licensing and Control position specifications and reclassify positions in line with standards.

APPROACH

- Advise T. Campbell that Information Management positions are appropriately classified, that a number in Licensing and Control are questionable and that a more detailed review of those positions is to be undertaken.
- Discussion with Dina Palozzi, Director, Licensing And Control Branch should take place as soon as possible, to discuss findings and recommendations of this review.
- Field trips should be undertaken and job audits should be performed in order to clarify discrepancies between information on position specification and on survey form.
- Position specifications should be updated where required and classified on own merits.

Joanne Hearst
Joan Crowther

April 1985

As the Report itself suggested, field studies of the actual duties were then carried out in the form of desk audits, involving direct interviews in June with some of the affected Microfilm Operators in Kingston. The only effect of these desk audits, however, was to confirm the conclusion reached in the Crowther-Hearst Report that the Microfilm Operator 3's in Kingston were out-of-line with standards, and with usage elsewhere in the Ministry and Public Service generally.

In the meantime, anxiety amongst the employees to be potentially affected in the Kingston Licensing and Control area had been increasing. The Kingston Office had for some time used a high number of unclassified employees in its operations, and a promise had been made to post these as "classified" vacancies in 1985. By mid-year those position-postings had appeared for all but the Microfilm Operators, and this raised questions concerning the delay with respect to the latter positions. It is apparent, however, that very limited information was being afforded by Head Office to local management with respect to the review being undertaken in the Microfilm area. The reason for this lack of discussion appears to have been attributable in part to the desire not to raise a commotion until a final course of action had been decided upon, and in part to the fact that the review arose out of a concern expressed by another area of the Ministry. Mike Nagel, the manager of the Support Services office in Kingston in which the Microfilm Operators worked, had, at least by sometime in June, had it brought to his attention that there were Microfilm Operators involved in another part of the

Ministry as well, but it is clear that Mr. Nagel himself had little information about the review and its status. Accordingly, Mr. Nagel was able to respond to the inquiries about the delayed postings only by indicating that the Microfilm Operator positions themselves were currently "under review", and that the matter was in the hands of Head Office.

The review itself was essentially completed by September 1985, and the results communicated to the Manager of Human Resources, Maria Waczyk. Ms. Waczyk herself was concerned about the need to actually downgrade the employees in the Kingston office who had been classified as Microfilm Operators 3's for years, and took the time to be satisfied that the downgrading could not be avoided through a re-organization of job functions in the department. Once it was made clear, however, that such was not possible, the decision to downgrade the affected operators was allowed to go forward. Originally it was decided to downgrade both the existing classified positions and the new positions being posted for the formerly unclassified staff as of December, 1985. However, it was decided at the senior levels of the Ministry to delay the downgrading of the classified staff until January 7, 1986, to allow them to be red-circled at a rate that would include the January 1st increase.

It fell to Mike Nagel, as local Manager, to announce at the monthly Employee Relations Committee meeting in November the results of the Microfilm review, and employee reaction was severe. A number of the Microfilm Operators had transferred from Downsview to Kingston when their Division moved and although it is acknowledged that there was nothing in their contracts about

"downgrading", they nonetheless regarded such action as a violation of the promise of "job security" made to them at the time of their move.

The relationship worsened further as a result of informal comments attributed to Mr. Nagel and to Mr. Bert Killian, the Manager of the Kingston Licensing Operations, that heightened the employees' perception that all of this was related in some way to the action of their counterparts in OHIP in filing their "usage" grievances (in which, in addition, certain of the Kingston employees were being asked to testify). The employers' evidence, however, flatly denies that any such comments either were or could have been made.

With the full evidence now before us, we do not find it necessary or useful to make a finding with respect to whether any such comments in fact were made. We say that because it is apparent that management in Kingston had very limited involvement in the review of the Microfilm Operator positions that had been going on, and did not possess significantly more knowledge than the Union or its members as to its source. Even if we were to be persuaded, therefore, that comments were made at the local management level which employees could regard as support for their perception that the source of the "trouble" was the filing of the OHIP grievances, it is apparent from the well-documented evidence before us that any such opinions would have been no less conjectural (based on the timing of events) or misconceived than those of the employees themselves. We accordingly do not find ourselves in the position of having to prefer the evidence of either of the parties with respect to these alleged comments.

With respect to the decision to downgrade itself, Ms. Miko on behalf of the Union quotes a passage from G. W. Adams' Canadian Labour Law, at page 491-2, to support an argument that certain management conduct can be so destructive of employee rights that an unlawful intent must be presumed simply from the effect of such conduct. That passage quotes the American case of Erie Resistors (1963), 373 U.S. 221, in part as follows:

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labour practice charge is made out.

Such a presumption of unlawful intent, however, has, (with the possible exception of International Wallcoverings, (1983), 4 Can. L.R.B.R. (N.S.) 289, also cited by Mr. Adams) generally been regarded in Ontario as a rebuttable one, contingent upon the trier of fact being satisfied of a real "business" purpose, wholly divorced from the exercise of the collective-bargaining rights in question, being the sole motivating factor behind management's action. And the fully-documented evidence of the employer in the present matter has, as indicated, satisfied us that that is the case. Neither can we accept Ms. Miko's characterization of the Crowther-Hearst Report as "tentative", nor her argument flowing from that that what really put management over the hump in coming to its decision to re-classify the Microfilm Operator positions was their subsequent awareness of the OHIP grievances. It is clear that MTC management was called upon as of November 1984 to address an apparent problem in the classification of Microfilm Operators in the Information

Management Office as against those in the Transportation Regulation Operations Division, and the Report of Crowther and Hearst read in its entirety leaves no doubt that, while diplomatic language such as "tenuous" was employed, the Report's authors found that the reason for the problem was that the Microfilm Operator positions in the latter Division were over-classified against the standards. The field audit recommended by the authors to verify the actual duties being performed by the operators in those positions simply confirmed the description of the jobs that had been obtained from the supervisors, as well as the overall conclusions of the Report. The various options considered by management in response to the problem are fully set out in the Report, and the question of an alternative to downgrading was raised again by Ms. Waczyk at the highest level of the Human Resources Branch in September. On all of the evidence, there is no foundation for concluding that the final decision to downgrade was motivated by anything other than the initial problem of internal relationships identified by Mr. T. Campbell in November 1984, and the results of the various audits against standards carried out by Head Office staff of the Ministry of Transportation and Communications subsequently.

The complaint accordingly must be dismissed.

DATED at Toronto, Ontario this 10th day of July, 1987.



M. G. Mitchnick, Alternate Chairman
For the Tribunal



Crown Employees Collective Bargaining Act, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0013/86

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(J. Vott, B. Harwood et al.)

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO
(Ministry of Revenue)

Respondent

BEFORE:

J.H. Devlin, Vice Chairman
M. Sullivan, Member
J.H. McGivney, Member

FOR THE APPLICANT:

W. A. Lokay
Inclusion Officer
Ontario Public Service Employees Union

Timothy Hadwen
Counsel
Cavalluzzo, Hayes & Lennon
Barristers and Solicitors

FOR THE RESPONDENT:

Anne Warner McChesney
Staff Relations Officer
Staff Relations Branch
Human Resources Secretariat

Eileen Hipfner
Staff Relations Officer
Staff Relations Branch
Human Resources Secretariat

Hearing:

January 20, 1987
March 14, 1988
May 2, 1988

DECISION

This matter involves an application pursuant to s.40(1) of The Crown Employees Collective Bargaining Act to determine whether thirty-one Managers, Mapping Services, working in various Regional Assessment Offices throughout the province are employees for purposes of the Act. As the parties were unable to agree upon a representative witness, the Tribunal heard evidence concerning the duties and responsibilities of four incumbents of the position. Of necessity, the Tribunal's decision relates only to the status of these individuals.

Until December of 1985, many of the individuals whose status is in issue were employed in the Regional Assessment Offices in which they currently work and were classified as Mapping Supervisors. As such, they were members of the bargaining unit. At a meeting of the Ministry Employee Relations Committee held on March 6, 1985, however, an issue was raised with the regard to the status of Mapping Supervisors. In particular, the Union expressed concern that certain incumbents of the position were actually exercising management responsibilities. Desmond Kirk, a Labour Relations Advisor in the Personnel Services Branch of the Ministry, testified that it was his understanding that the concern emanated from a complaint regarding the duties being performed by the Mapping Supervisor in the Regional Assessment Office in Brockville. In any event, the Minutes of the meeting of March 6, 1985 which were signed by representatives of both the Ministry and the Union indicate that in response to the concern expressed, "management agreed to consider the matter of exclusion from the bargaining unit".

At subsequent meetings at the Ministry Employee Relations Committee held in the summer and fall of 1985, management indicated that exclusion of Mapping Supervisors from the bargaining unit was still under consideration and that there was no intent to have bargaining unit members performing "management tasks".

At some point in the fall of 1985, it would appear that two grievances were filed, one in which Drafters 1 sought to be reclassified as Drafters 2 and in the second, Mapping Supervisors, then classified as Drafters 2, sought to be reclassified as Drafters 3. In fact, the first of these grievances was resolved as a result of a reorganization of the Ministry's assessment program which was announced in early December of 1985. As part of that reorganization, Drafters 1 were reclassified as Drafters 2. In addition, the Ministry established the position of Manager, Mapping Services, a position which was excluded from the bargaining unit. Vacancies in this position were posted in thirty-one Regional Assessment Offices across the province and in most, but not all cases, the successful applicant was the incumbent of the position of Mapping Supervisor.

The job specifications for the positions of Mapping Supervisor and Manager, Mapping Services, were introduced in evidence and under the heading, Purpose of Position, the former specification provides as follows: "To organize and supervise the

Mapping Section in the preparation and maintenance of assessment maps; to oversee the searching of Registry records for legal descriptions and ownerships of properties; to supervise the issuing of lien clearances". The balance of the specification contains a list of the particular duties to be performed and for the most part, these duties relate to the performance of drafting and mapping functions and the technical supervision of staff performing such work. The specification also provides that the incumbent is responsible for such duties as selecting new staff in conjunction with the Manager Assessment Services, training new staff, evaluating the performance of staff by completing an employee appraisal form which is to be reviewed with the incumbent's Supervisor prior to discussion with the individual employee, arranging vacation schedules, recommending merit increases, promotions, demotions and appointments to regular staff and administering normal staff discipline, including recommending action to be taken in serious cases. The specification further provides that the incumbent is to resolve employee problems and grievances verbally and in writing and to identify the need for additional staff and determine material and supply requirements for the Mapping Section.

The job specification for the position of Manager, Mapping Services provides that the purpose of the position is "to manage staff engaged in the preparation and maintenance of assessment maps and the search of Registry Office records for legal descriptions and ownership of properties, issuing reports

on the Unit's activities and assisting in long range planning. To perform drafting/mapping/searching duties as assigned." Like the specification for the position of Mapping Supervisor, the major responsibilities of the Manager, Mapping Services, include drafting and mapping assignments and the supervision of employees engaged in such work. In addition, the specification provides that the incumbent is responsible for supervising staff, developing career and training plans, and recruiting and selecting staff. The incumbent is also responsible for recommending merit increases, imposing discipline, assessing employee performance, responding to grievances at the first stage and communicating human resource needs.

As indicated at the outset, the Tribunal heard evidence from four incumbents of the position of Manager, Mapping Services as well as evidence from two Managers, Data Services and Mapping to whom the Manager, Mapping Services reports. The Manager, Data Services and Mapping reports to the Regional Assessment Commissioner.

Tom T'Mannetje, is the Manager, Mapping Services in the Regional Assessment Office in Hamilton. Prior to December of 1985, Mr. T'Mannetje worked in the same office for a period of some sixteen years, during which time he was classified as a Mapping Supervisor. Mr. T'Mannetje testified that the Mapping Section was initially established in 1971 to provide property maps and information to the Assessment Department. More

recently, the section has been also been involved in responding to inquiries from a number of different sources, including the general public, municipalities and other government departments.

The Mapping Section in the Regional Assessment Office in Hamilton consists of the Manager, Mapping Services, two Drafters and one Registry Clerk, although Mr. T'Mannetje testified that this latter position is being phased out. Mr. T'Mannetje performs his duties in a large room which is also occupied by the two Drafters and the Registry Clerk. Gerry Bertrand, who assumed the position of Manager, Data Services and Mapping in June of 1986, has an office across the hall. Mr. Bertrand is responsible for both the Mapping Section and the Services Department in which assessment functions are performed. Mr. Bertrand estimated that approximately 90% of his time is devoted to assessment matters and the balance to mapping.

Mr. T'Mannetje testified that his time is spent performing drafting and mapping duties, providing technical advice and guidance to staff, members of the public, Registry personnel and others and, in particular, fielding complex or difficult questions. Although Mr. T'Mannetje is responsible for co-ordinating and administering the activities of the Mapping Section, training staff and assigning and evaluating the work performed, Mr. T'Mannetje testified that the Drafters are experienced and require little in the way of day-to-day direction. Mr. T'Mannetje estimated that he spends approximately

90% of his time in the performance of technical duties and providing technical supervision to staff in the Mapping Section.

With regard to those supervisory duties which do not pertain to the technical work of the Section, Mr. Bertrand testified that Mr. T'Mannetje is responsible for recommending merit increases, issuing verbal or written warnings, responding to grievances at stage 1, attending stage 2 meetings and giving evidence at arbitration hearings, if necessary. Mr. Bertrand conceded, however, that he did not advise Mr. T'Mannetje of many of these responsibilities as he assumed that this had been done prior to June of 1986. In fact, Mr. T'Mannetje testified that there are a number of matters in respect of which he has had no experience and about which he has received no instruction. These consist of developing career and training plans for staff members, recommending merit increases, imposing discipline and responding to employee grievances. Mr. T'Mannetje testified that if a problem arose with an employee in the Mapping Section, he would speak to Mr. Bertrand, and in the event of a grievance, he believed that Mr. Bertrand would formulate the reply.

With regard to recruitment and selection of staff, Mr. T'Mannetje testified that he prepared technical questions and sat on an interview panel with the Manager, Data Services and Mapping and the Regional Assessment Commissioner in November of 1986 in connection with a lateral transfer. Although a consensus

was reached on the successful applicant, Mr. Bertrand suggested that if a difference of opinion arose with regard to an applicant's technical competence, the recommendation of Mr. T'Mannetje would govern.

With regard to the matter of performance appraisals, Mr. T'Mannetje testified that prior to December of 1985, he prepared draft appraisals to which the Manager, Data Services and Mapping made additional comments and changes. These draft appraisals also required the approval of the Manager, Data Services and Mapping and the Regional Assessment Commissioner. Although at one point, prior to December of 1985, Mr. T'Mannetje ceased preparing draft appraisals as a result of a complaint by the Union, Mr. Bertrand testified that Mr. T'Mannetje was to be responsible for appraising employee performance beginning in 1987.

Insofar as vacation scheduling and the granting of casual time off are concerned, the Manager, Data Services and Mapping has established certain guidelines, and within these guidelines Mr. T'Mannetje has the discretion to grant an individual employee time off. Given the size of the Mapping section, however, it was conceded that there is little potential for conflict in this area. Mr. T'Mannetje is also responsible for requisitioning equipment and supplies for the Section and although he has authority to recommend an increase in staff, he testified that in the past, a recommendation which he made to this effect was not followed.

Since his exclusion from the bargaining unit in December of 1985, Mr. T'Mannetje has attended a number of management training courses; one pertaining to the essentials of management and another dealing with performance appraisals. In respect of this latter course, Mr. T'Mannetje testified that he was not advised that he was to apply what he learned to the evaluation of staff in the Mapping Section. Since June of 1986, Mr. Bertrand testified that T'Mannetje has attended two monthly management meetings in which issues of policy were discussed. Although Mr. Bertrand described Mr. T'Mannetje as a member of the management team, Mr. T'Mannetje testified that, in fact, there has been no change in his essential job duties since December of 1985.

The next Manager, Mapping Services, in respect of whom the Tribunal heard evidence, was Robert Young. Mr. Young has worked in the Regional Assessment Office in Goderich for a period of approximately sixteen years and prior to December of 1985, he was classified as a Mapping Supervisor. The Mapping Section in the Goderich office consists of Mr. Young and two Drafters 2. Mr. Young testified that the work of the Section is performed in one large room and although his immediate Supervisor, Mr. McMeekin has an office on another floor of the building, there is frequent contact between the two. As the Manager, Data Services and Mapping, Mr. McMeekin directly supervises Mr. Young, as well as the Manager of Assessment. Mr. McMeekin estimated that 80% of his time is devoted to assessment matters and the balance to mapping.

Like Mr. T'Mannetje, Mr. Young performs certain drafting and mapping functions, although he testified that he does not spend a significant portion of his time on these duties. Mr. Young also provides advice and guidance on technical matters, schedules and supervises the work of the Mapping Section and is responsible for the quality and quantity of work produced. Mr. Young is the most senior employee in the Regional Assessment Office with technical expertise in mapping.

In respect of those supervisory duties which are not of a technical nature, Mr. McMeekin testified that having received the appropriate training, Mr. Young was to be responsible for appraising employee performance beginning in 1987 and for recommending merit increases. Mr. McMeekin also testified that Mr. Young is responsible for fielding complaints from staff and for responding to grievances at the first stage. He agreed, however, that this latter responsibility has not been exercised as no grievances have been filed.

Despite the evidence of Mr. McMeekin, Mr. Young testified that he has had no involvement nor received any instruction with regard to the preparation of employee performance appraisals, recommending merit increases, imposing discipline or replying to employee grievances. In the event of a grievance, Mr. Young expressed the opinion that the grievance would be referred to Mr. McMeekin. Mr. Young also testified that his staff is experienced and as a result, there has been no

need to develop career and training plans. Five to six years ago, Mr. Young testified that he recommended the transfer of an employee to another work area.

With regard to the selection and recruitment of staff, Mr. Young has prepared technical questions and sat on interview panels although this has not occurred since his exclusion from the bargaining in December of 1985. On earlier occasions, when Mr. Young sat on interview panels, he testified that the successful applicant was chosen by the Manager, Data Services and Mapping or the Regional Assessment Commissioner. Although Mr. Young testified that he has received no instructions concerning selection and recruitment since December of 1985, Mr. McMeekin testified that if Mr. Young sat on an interview panel at the present time, he would have an equal voice in the selection of the successful applicant and if a difference of opinion arose with regard to a technical issue, Mr. Young's recommendation would prevail.

In respect of vacation scheduling and the granting of casual time off, Mr. Young testified that requests are made directly to the Manager, Data Services and Mapping. Mr. Young also testified that he has no authority to increase the number of staff in the Mapping Section although he does submit a report monthly to his supervisor with regard to production within the Section. Mr. Young also has no involvement in budget preparation, although he does request supplies for his Section.

Since December of 1985, Mr. Young has attended a number of management training courses and in 1986, he attended three management meetings. He testified that at these meetings policy, but not personnel, was not discussed. Although Mr. McMeekin described Mr. Young as a member of the management team, like Mr. T'Mannetje, Mr. Young testified that there has been no real change in his job duties since December of 1985 and that a high percentage of his time is spent in the performance of technical duties and providing technical supervision to employees in the Mapping Section.

Robert Nicol is the Manager, Mapping Services in the Regional Assessment Office in Brockville and from December of 1979 to December of 1985, he was classified as a Mapping Supervisor. Mr. Nicol supervises two Drafters 2 and like Mr. T'Mannetje, and Mr. Young, Mr. Nicol is responsible for co-ordinating the day-to-day activities of the Section and for the technical supervision of staff. Mr. Nicol testified that the Manager, Data Services and Mapping in Brockville does not have expertise in mapping matters and as a consequence, on technical issues, Mr. Nicol has the final word.

Since 1979, Mr. Nicol has prepared employee appraisal forms which he has discussed with his immediate Supervisor who has made changes of a minor nature only. Mr. Nicol has interviewed the individual employees involved and, thereafter, his Supervisor has signed the appraisal forms to indicate his

approval. Since 1979, Mr. Nicol has also recommended merit increases and testified that his recommendations have always been followed. In 1984, Mr. Nicol recommended the appointment of a probationary employee to the permanent staff and although he has not actually performed this function since his exclusion from the bargaining unit, he testified that he understands that it is his responsibility to do so. Mr. Nicol has also recommended the transfer of an employee to another work area.

Mr. Nicol has actually counselled staff in the Mapping Section and, on one occasion, he testified that he discussed the matter with his Supervisor and also sought advice and guidance from the Personnel Department. Although Mr. Nicol has been instructed that he is responsible for issuing verbal and written warnings and recommending more severe forms of discipline, there has been no necessity for him to exercise these responsibilities. Mr. Nicol has also not been required to respond to a grievance at stage 1 as none has been filed, although, once again, he testified that he understands that he is responsible for doing so as well as for attending stage 2 meetings and giving evidence at arbitration hearings, if necessary.

Prior to 1985, Mr. Nicol testified that he was involved in the selection of the two Drafters whom he currently supervises. In particular, he screened the applicants for the vacancies, prepared technical questions and sat on the interview

panels. In both cases, a consensus was reached among the members of the panel with respect to the successful applicant, although Mr. Nicol was confident that if a difference of opinion had arisen, his recommendation would have prevailed. Since December of 1985, Mr. Nicol testified that he has interviewed applicants for seasonal positions and that he has been instructed that selection of staff is one of his responsibilities.

Mr. Nicol testified that he is also responsible for scheduling vacations for employees in the Mapping Section, granting casual time off and recommending compassionate or discretionary leave to the Commissioner. In addition, Mr. Nicol recommends overtime for staff in the Mapping Section and the decision as to whether overtime is necessary is made by the Management Committee, of which Mr. Nicol is a member. Mr. Nicol also orders supplies and submits a report to the Management Committee with regard to the requirements of his Section. Mr. Nicol testified that the Management Committee is responsible for preparing the budget which is reviewed throughout the year.

Since December of 1985, Mr. Nicol has attended a number of management training courses and he also attends management meetings approximately once per month. At these meetings, policy issues are discussed as well as staff and personnel matters. Mr. Nicol testified that he plays an equal role with other Managers at these meetings.

Mr. Nicol estimated that he spends approximately 25% of his time dealing with technical problems and the balance performing managerial or supervisory duties. He agreed, however, that 40% of his supervisory duties pertain to technical work of the Mapping Section and that he spends a relatively small amount of time on managerial supervision of the two Drafters.

The final Manager, Mapping Services, in respect of whom the Tribunal heard evidence, was Michael Simpson, who works in the Regional Assessment Office in Lindsay and was a Mapping Supervisor in that office from August of 1970 to December of 1985. There are sixty employees in the Lindsay office and Mr. Simpson testified that he is responsible for supervising three Drafters 2 and one Registry Clerk. Mr. Simpson does not actually perform drafting and mapping functions but assigns these duties to staff within his Section to whom he provides technical guidance and oversees the performance of their work. Like Mr. Nicol, Mr. Simpson testified that the Manager, Data Services and Mapping does not have technical expertise in mapping and, as a result, there is no other member of management from whom he may obtain technical advice and guidance.

Since 1970, Mr. Simpson testified that he has appraised employee performance with only minor input from management, recommended merit increases, recommended that probationary employees be appointed to the permanent staff and has also recommended the transfer of an employee to another work area.

Mr. Simpson is also responsible for counselling employees and responding to complaints by members of staff. Although Mr. Simpson has never imposed discipline, he testified that he understands that he is responsible for issuing verbal and written warnings, imposing suspensions and recommending the dismissal of employees.

Since December of 1985, Mr. Simpson has responded to three grievances at stage 1 and testified that it is his responsibility to attend meetings at stage 2 and to give evidence at arbitration hearings, if necessary. The three grievances to which Mr. Simpson responded all involved classification matters and Mr. Simpson testified that although he obtained advice from Personnel, he had authority to resolve these grievances at that stage. In the event of a difference of opinion, however, Mr. Simpson conceded that the decision of Personnel would govern.

Since 1970, Mr. Simpson testified that he has screened applicants for positions in the Mapping Section, that he has interviewed applicants and recommended the applicant to whom, in his opinion, the job ought to be offered. In the past, Mr. Simpson's recommendations have been followed and he testified that, in fact, he is responsible for the selection of staff in his Section.

Mr. Simpson is also responsible for scheduling vacations for staff in the Mapping Section and for granting

casual time off. In addition, Mr. Simpson recommends overtime for his Section and the decision as to the necessity of overtime rests with the management team, of which Mr. Simpson testified he is a member.

Mr. Simpson has attended a number of management training courses, some of which were conducted prior to December of 1985. Mr. Simpson attends management meetings bi-monthly and he testified that at these meetings, policy issues, sales, personnel issues and upcoming grievances are discussed. Budget preparation is also a topic of discussion and Mr. Simpson testified that he has input into capital expenditures of the Mapping Section.

Mr. Simpson estimated that 5% to 10% of his time is spent in technical drafting duties and the balance is devoted to the supervision of staff in the Mapping Section. A significant portion of Mr. Simpson's time, however, involves supervising the technical work of the Department and Mr. Simpson estimated that approximately 15% of his time is devoted to matters such as recruitment and selection of staff, recommending merit increases, imposing discipline, assessing performance and responding to grievances.

On the basis of the evidence presented, it was the position of the Union that Messrs. T'Mannetje, Young, Nicol and Simpson are employees for purposes of The Crown Employees

Collective Bargaining Act. It was the position of the Ministry that each of these persons is employed in a managerial capacity and in this respect, the Ministry relied upon Sections 1.(1)(1)(iii) and (iv) of The Crown Employees Collective Bargaining Act which provide as follows:

"1.(1) In this Act,

...

(1) 'person employed in a managerial or confidential capacity' means a person who,

...

(iii) spends a significant portion of his time in the supervision of employees,

(iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,"

It was the position of Mr. Hadwen, on behalf of the Union, that in determining whether an individual spends a significant portion of his time in the supervision of employees within the meaning of Section 1.(1)(1)(iii) of The Crown Employees Collective Bargaining Act, a distinction must be drawn between technical or professional supervision on the one hand, and managerial supervision on the other. In this case, Mr. Hadwen contended that the Managers, Mapping Services, in respect of whom the Tribunal heard evidence, spend a significant portion of their time providing technical supervision but that the same

cannot be said in respect of the provision of managerial supervision. Mr. Hadwen suggested that there was no evidence that Mr. T'Mannetje or Mr. Young exercise any independent discretion characteristic of an individual employed in a managerial capacity. Although Mr. Nicol has some measure of independent discretion, it was submitted that this is limited and he is primarily involved in providing technical guidance to employees in the Mapping Section. Mr. Hadwen submitted that only in the case of Mr. Simpson might it be argued that there was evidence of sufficient independent decision-making to justify his exclusion from the bargaining unit.

In respect of Section 1.(1)(1)(iv) of The Crown Employees Collective Bargaining Act, Mr. Hadwen contended that there is no basis to exclude any of the four Managers, Mapping Services, from the bargaining unit. Mr. Hadwen pointed out that Mr. T'Mannetje, Mr. Young and Mr. Nicol have not responded to grievances at stage 1 and Mr. T'Mannetje and Mr. Young do not believe that they would actually reply to a grievance if one was filed. Although Mr. Nicol has a different understanding with regard to his responsibility, nevertheless, Mr. Hadwen submitted that it would be inappropriate to exclude Mr. Nicol on the basis of a function which he has not performed. While Mr. Simpson has replied to three grievances, Mr. Hadwen pointed out that in so doing, he sought advice from the Personnel Department and acknowledged that the decision of that Department would prevail in the resolution of these grievances. Once again, therefore, it

was submitted that there was not a sufficient basis upon which to exclude Mr. Simpson from the bargaining unit.

In support of the Union's position, Mr. Hadwen made reference to the following decisions: Ontario Public Service Employees Union (Bethell) and The Crown in Right of Ontario File No. 9/76; Ontario Public Service Employees Union and Family Services of Hamilton-Wentworth Inc. [1980] O.L.R.B. Rep. 204; Ontario Public Service Employees Union (T. Cairns et al.) and The Crown in Right of Ontario (Management Board of Cabinet) File No. T/31/81 and Ontario Public Service Employees Union (James Atwood et al.) and The Crown in Right of Ontario (Ministry of Health) File No. T/57/84.

It was the submission of Ms. Hipfner, on behalf of the Ministry, that the four Managers, Mapping Services, in respect of whom the Tribunal heard evidence, are properly excluded from the bargaining unit as they are members of their respective management teams and have a community of interest with management. Ms. Hipfner contended that all four individuals have responsibility for performing traditional managerial functions such as recruiting staff, appraising employees and imposing discipline and that their exclusion from the bargaining unit cannot depend upon the frequency with which their authority is exercised. Ms. Hipfner further submitted that the mapping function is highly technical and as often the Manager, Mapping Services is the most senior employee with technical expertise,

this constitutes an exception to the general rule that a Manager is not required for every small group of employees.

Apart from the fact that Messrs. T'Mannetje, Young, Nicol and Simpson spend a significant portion of their time in the supervision of employees, Ms. Hipfner also contended that each is responsible for responding to grievances at stage 1. Although Ms. Hipfner acknowledged that only Mr. Simpson has actually exercised this responsibility, again, she submitted that it is the authority to deal with employee grievances which is essential and not the actual exercise of that authority.

In support of the Ministry's position, Ms. Hipfner made reference to the following decisions: The Crown in Right of Ontario and Ontario Public Service Employees Union (McWilliams) File No. T6/76; Ontario Public Service Employees Union (Bertolo) and The Crown in Right of Ontario File No. T4/76; Ontario Public Service Employees Union (Burton) and The Crown in Right of Ontario (Management Board of Cabinet) File No. T/7/79 and Ontario Public Service Employees Union (T. Cairns et al.) and The Crown in Right of Ontario (Management Board of Cabinet) File No. T/31/81.

The issue, then, is whether Messrs. T'Mannetje, Young, Nicol and Simpson, are employees for purposes of The Crown Employees Collective Bargaining Act. In addressing this issue, we agree with Mr. Hadwen that the statements made by the

Union at the Ministry Employee Relations Committee meetings which were recounted by Mr. Kirk, are not determinative of the matter. Although the Union evidently expressed concern that some Mapping Supervisors were exercising certain managerial functions, there was no evidence of a clear concession on the part of the Union that all Mapping Supervisors or that any particular incumbents of that position were properly excluded from the bargaining unit as being employed in a managerial capacity. The status of the individual Mapping Supervisors, therefore, must be determined on the basis of the duties and responsibilities which they perform.

In this respect, we propose to begin by considering an issue which is common to all four Managers, Mapping Services, and this relates to the technical supervision which they provide to staff in the performance of mapping functions. In our view, this is not this type of supervision to which reference is made in Section 1.(1)(iii) of The Crown Employees Collective Bargaining Act, nor is it this type of supervision which requires exclusion from the bargaining unit. It is a common occurrence that employees in higher classifications provide technical or professional supervision to employees in lower classifications and yet continue to be members of the bargaining unit. Employees with particular expertise may also function as Lead Hands or working Foremen and in the exercise of their duties, there is no inherent conflict with their membership in the unit. Instead, it is the exercise of managerial supervision involving responsibilities which have a direct impact upon the terms and

conditions of employment of subordinate employees which is the type of supervision which will result in a conflict of interest and by virtue of which an individual will be employed in a managerial capacity within the meaning of the Act.

Turning, then, to the individual Managers, Mapping Services, we propose to consider Mr. T'Mannetje and Mr. Young together as there are a number of similarities in their duties and responsibilities. Although Mr. Bertrand and Mr. McMeekin testified that Mr. T'Mannetje and Mr. Young are members of the management team and responsible for managerial supervision, the evidence of Mr. T'Mannetje and Mr. Young reveals that they exercise, little, if any, independent discretion. In most instances, they defer to the Manager, Data Services and Mapping and they appear to view their supervisor as having effective control in matters involving personnel in the Mapping Section. Although Mr. T'Mannetje and Mr. Young have attended management meetings, they do not appear to have done so on a regular basis nor is it evident that they play any meaningful role in the decision-making which occurs at such meetings. Moreover, by the time Mr. T'Mannetje and Mr. Young gave their evidence, they had each held the position of Manager, Mapping Services for approximately one year and, yet, there were a number of responsibilities attributed to them by Mr. Bertrand and Mr. McMeekin in respect of which they had received no instruction whatsoever. In all the circumstances, then, it cannot be said that Mr. T'Mannetje or Mr. Young spend a significant portion of their time in the supervision of employees.

Mr. T'Mannetje and Mr. Young have had no experience dealing with employee grievances as no grievances have been filed in the Mapping Sections in their respective Assessment Offices since December of 1985. It is of note, however, that neither Mr. T'Mannetje nor Mr. Young believed that they would actually formulate the reply to a grievance in the event that one was filed. In the absence of evidence that Mr. T'Mannetje and Mr. Young have any real authority to deal with a grievance, we do not find that they ought to be excluded from the bargaining unit by virtue of Section 1.(1)(1)(iv) of The Crown Employees Collective Bargaining Act. In the result, we find that Mr. T'Mannetje and Mr. Young are employees for purposes of the Act.

Like Mr. T'Mannetje and Mr. Young, Mr. Nicol is also involved in technical supervision although, for the reasons stated earlier, we do not view this as the indicative of the fact that he is employed in a managerial capacity. Unlike Mr. T'Mannetje and Mr. Young, however, Mr. Nicol has been instructed that he has responsibility in a number of areas involving managerial supervision. Some of these responsibilities he has actually exercised, some he has not. While Mr. Nicol has perhaps more independent discretion than does Mr. T'Mannetje or Mr. Young, we find that this discretion is circumscribed and it is not clear that he has any real measure of effective control in respect of those matters which would dictate his exclusion from the bargaining unit.

The time spent by Mr. Nicol in the supervision of employees is also limited by the fact that he is responsible for supervising only two Drafters who are evidently experienced and skilled in their job duties. In Ontario Public Service Employees Union (T. Cairns et al.) and The Crown in Right of Ontario (Management Board of Cabinet) File No. T/31/81, another panel of the Tribunal had this to say:

"

"

...

A Manager is not required for every small group. It is not credible to expect that there will be a Manager for every two or three employees unless special circumstances dictate. Thus, given the size of the field crews, one must be suspicious of the need for a management person particularly where the employees are reasonably skilled and tend to know their job.

..."

In Cairns, special circumstances were found to exist as the survey crews operated in the field, and in the event that difficulties arose, managerial decision-making was required of the senior party chiefs.

In our view, however, no analogy can be drawn between the circumstances in Cairns and the situation of Mr. Nicol in the Regional Assessment Office in Brockville. Working in that office is Mr. Nicol's immediate supervisor, the Manager, Data Services and Mapping and, in addition, the Regional Assessment Commissioner. Although these individuals may not have technical expertise in the field of mapping, once again it is not the

performance of technical duties or the provision of technical supervision which necessitates an exclusion from the bargaining unit. In matters of managerial supervision, Mr. Nicol is neither isolated nor solely responsible for managerial decision-making on site. Given the nature of Mr. Nicol's duties and responsibilities and the fact that he supervises only two Drafters, we do not find that he spends a significant portion of his time in the supervision of employees within the meaning of Section 1.(1)(1)(iii) of The Crown Employees Collective Bargaining Act. In reaching this conclusion, we wish to stress that we do not intend to diminish the importance of the technical supervision which Mr. Nicol provides to staff in the Mapping Section. It is simply that the exercise of this responsibility does not conflict with his membership in the bargaining unit.

By the time Mr. Nicol gave his evidence in January of 1987, he has not responded to a grievance, although he testified that it is his responsibility to do so. While it is not necessary that this responsibility actually be exercised in order to find that a person is employed in a managerial capacity, nevertheless, the individual must have real authority to deal with and resolve employee grievances, at least at the initial stage. As noted in Ontario Public Service Employees Union (T. Cairns et al.) and The Crown in Right of Ontario (Management Board of Cabinet), supra, dealing formally with a grievance requires something more than transmitting documents from an employee to someone higher in authority. In this case, given

that there is not wide scope for independent decision-making in other areas, the evidence is not sufficient to conclude that Mr. Nicol should be excluded from the bargaining unit by virtue of Section 1.(1)(1)(iv) of The Crown Employees Collective Bargaining Act. In the result, therefore, we find Mr. Nicol to be an employee for purposes of the Act.

Finally, we turn to Mr. Simpson. Of the four Managers, Mapping Services, in respect of whom the Tribunal heard evidence, Mr. Simpson appears to have the greatest scope for independent decision-making. At the same time, and while Mr. Simpson supervises four employees rather than two, the group is, nevertheless, a small one. In any event, strictly speaking, it is unnecessary for the Tribunal to determine whether Mr. Simpson is properly excluded from the bargaining unit by virtue of his spending a significant portion of his time in the supervision of employees. In our view, Mr. Simpson is employed in a managerial capacity because he is required, by reason of his duties and responsibilities, to deal formally on behalf of the employer with a grievance of an employee within the meaning of Section 1.(1)(1)(iv) of The Crown Employees Collective Bargaining Act.

As indicated previously, Mr. Simpson has responded to three grievances and in each case, the grievance concerned the placement of an employee on the pay scale. In our view, the evidence does not suggest that Mr. Simpson acted as a mere conduit and although he consulted the Personnel Department, this

is a common practice in many large organizations and is necessary to ensure consistent treatment of employees. Such consultation, however, does not necessarily detract from the responsibility and authority of the individual Manager to respond to a grievance. In this case, Mr. Simpson testified that he had authority to resolve each of the grievances to which he replied at stage 1 and, in these circumstances, we find that Mr. Simpson is employed in a managerial capacity and, therefore, he is not an employee for purposes of The Crown Employees Collective Bargaining Act.

We appreciate that it may be administratively inconvenient for some incumbents of the position of Manager, Mapping Services to be included in the bargaining unit while others are not. At the same time, these incumbents work in different Assessment Offices throughout the province and there is evidently some diversity in the nature and extent of their duties and responsibilities. As indicated at the outset, this decision pertains only to the status of Messrs. T'Mannetje, Young, Nicol and Simpson. Our comments, however, may provide some guidance to the parties with respect to the status of other incumbents of the position of Manager, Mapping Services. We understand that in the event the parties continue to disagree about particular incumbents, they will proceed initially with the assistance of a

Labour Relations Officer. The Tribunal, however, remains seized to provide any directions which may be necessary and to determine the status of the remaining incumbents, if required.

DATED AT TORONTO this 8th day of September, 1988


Vice-Chairman


M. Sullivan, Member

I dissent. (Dissent attached.)


J.H. McGivney, Member

DISSENT

I support the decision of the majority except as it pertains to the determination that Mr. Nicol is an employee for the purposes of the Crown Employees Collective Bargaining Act (the "Act"). The decision is based in part on the view expressed on page 23 that "it is not clear that he (Mr. Nicol) has any real measure of effective control in respect of those matters which would dictate his exclusion from the bargaining unit." The other aspect of the majority decision flows from the fact that Mr. Nicol is responsible for two Drafters in the Mapping Services unit and referring to Ontario Public Service Employees Union (T. Cairns, et al and The Crown in Right of Ontario, Management Board of Cabinet) File No. T/31/81 where it was said:

"A manager is not required for every small group. It is not credible to expect that there will be a manager for every two or three employees unless special circumstances dictate. . . ."

In my view, the evidence supports the view that Mr. Nicol meets the criteria of a person employed in a managerial or confidential capacity as outlined in the Act.

It is not without significance that this matter first surfaced by the complaint of the bargaining agent that Mr. Nicol was performing management functions while he was a Mapping Supervisor and, therefore, a member of the OPSEU bargaining unit. The Ministry and the bargaining agent agreed that employee members of the bargaining unit should not perform management functions. A new position was then established as Manager of Mapping Services and that position was subject to competition in each of the affected regions. In most cases, including Mr. Nicol's, the Incumbent Supervisor was the successful candidate. The majority decision would impact on Mr. Nicol in that presumably the newly created position would be eliminated, management functions would be reassigned and a new position would be established in the bargaining unit with reduced responsibilities. While it is not a consideration that bears on the decision, the "yo-yo" effect on an affected employee and the adverse effect on pay scales are unfortunate results of this short history.

It would seem to be clear that the working environment in Mr. Nicols' unit is not conducive to heavy discipline nor labour/management conflict in the industrial model. Further, the supervision of two persons would not normally involve the number and complexity of problems that might be encountered in a larger working unit. There are nevertheless important managerial functions to be performed including the

responsibility for labour/management conflicts in his unit. The dearth of activity should not be employed to support a decision that Mr. Nicol is not employed in a managerial or confidential capacity.

According to the evidence, Mr. Nicol is responsible for issuing verbal and written warnings and for recommending more serious discipline and for responding to any grievance at stage 1, and for attending a stage 2 grievance meeting.

Mr. Nicol has effectively recommended that a probationary employee be hired as permanent staff, and he has recommended the abolition of a permanent job in his unit and the transfer of an employee to another department. He has counselled a member of his staff and discussed the matter with Personnel prior to taking such action. The foregoing matters were initiated by Mr. Nicol, discussed with his supervisor and in each case his recommendation was implemented.

He has conducted interviews with applicants for seasonal employment and he has been instructed that it is his responsibility to select such staff.

He prepares the budget requests for his unit and provides same to the Management Committee, of which he is a member, which establishes the budget for all departments within the Commissioner's responsibility.

He determines vacation schedules, grants casual time off and recommends in writing to the Commissioner compassionate and discretionary leave and the Commissioner approves same and, in this respect, Mr. Nicol's recommendations have always been followed.

He has participated as a member on two selection committees and has screened the applications for jobs in his unit, determined the applicants to be interviewed, and drafted the questions to be used by the selection committee. He is of the opinion that he would have the say on the person to be hired in his unit if there was not a consensus within the selection committee.

He is a member of the Management Committee with the Commissioner and the Manager of Data and Support Services. This committee meets at least monthly and the discussions include policy, budget and personnel matters. He has attended courses in management. Mr. Nicol establishes priorities for his unit, long term objectives and regularly maintains notes to support the annual performance appraisal of his subordinates and he is responsible for the quantity and quality of the work performed in his unit.

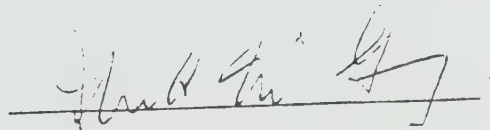
Neither the Commissioner nor Mr. Nicol's superior have the technical expertise employed in the mapping section. The implementation of the decision of the majority would probably result in three additional people reporting to Mr. Nicol's superior and the assignment to him of those management functions previously performed by Mr. Nicol. Depending on the number of subordinates and the diverse nature of their tasks, a supervisor may have more subordinates than he can effectively manage. It is acknowledged that in any large organization such as the Ministry, there are constraints on the ability of supervisors and managers to act independently. In many cases, in personnel and labour matters, the constraints are imposed in the interest of consistency, however, these do not diminish the nature and importance of the managerial functions performed by the manager.

In my view, Mr. Nicol is employed in a managerial or confidential capacity in that, in the context of his job, he is involved in the supervision, both technical and managerial, of his people, and his responsibilities include the handling of employee complaints and his involvement in the first and second stage of the grievance procedure and, while Mr. Nicol supervises

only two persons, the evidence as outlined above supports the finding of special circumstances.

Dated at Windsor, Ontario, this 29th day of August.

1988.

A handwritten signature in dark ink, appearing to read "John H. McGivney", is written over a horizontal line.

John H. McGivney



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T/0015/86

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT
R.S.O., 1980, c. 108.

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Ronald Francis

Complainant

- And -

Amalgamated Transit Union, Local 1587

Respondent

- And -

G.O. Transit

Intervener

BEFORE:

M. Mitchnick, Alternate Chairman
M. Sullivan, Member
R. Drennan, Member

FOR THE COMPLAINANT:

C. Westman, Esq.
Westman, Voll
Barristers and Solicitors

FOR THE RESPONDENT:

P. Cavalluzzo, Esq.
Cavalluzzo, Hayes and Lennon
Barristers and Solicitors

FOR THE INTERVENOR:

J. Desjardins
Personnel Manager
G.O. Transit

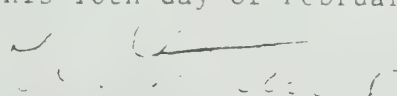
HEARING DATE:

January 19, 1987

DECISION

This matter is adjourned sine die at the request of the complainant.

DATED at Toronto, Ontario, this 16th day of February, 1987.



M. Mitchnick,
Alternate Chairman
For the Tribunal



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T/0015/86-2

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T/0015/86

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ronald Francis

Complainant

- and -

Amalgamated Transit Union, Local 1587

Respondent

Before:

M.G. Mitchnick
M. Sullivan
W. Madigan

Alternate Chairperson
Member
Member

For the
Complainant:

C. Westman
Counsel
Westman, Voll & Elstner
Barristers & Solicitors

For the
Respondent:

P. Cavalluzzo
Counsel
Cavalluzzo, Hayes & Lennon
Barristers & Solicitors

Hearings:

January 19, 1987
February 17, 1989
November 28, 1989

A W A R D

This is a case with a lengthy and unfortunate history. The complainant, Ron Francis, joined GO-Transit as a bus-driver in March of 1985, and was discharged for misappropriation of company funds approximately nine months later. A grievance was filed by the Union on his behalf. However, after some dealings between Mr. Francis and the Union which will be discussed shortly, the grievance was not proceeded with as part of a "settlement" worked out between the employer and the Union. That was a settlement at no time embraced by Mr. Francis, and he several months later sought to have the company and the Union re-open his case. Mr. Francis was unsuccessful in those endeavours, and in September of 1986 filed a complaint with this Tribunal alleging that he had been dealt with by the Union contrary to the provisions of section 30 of the Crown Employees Collective Bargaining Act. Section 30 reads:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

That complaint came on for hearing before the Tribunal on January 19, 1987, at which point it became apparent to the complainant that he had not fully canvassed the possibility of taking a grievance to arbitration on his own under the particular provisions of the aforesaid Act. Counsel for the

complainant accordingly requested an adjournment to permit the complainant a more direct attempt before the Crown Employees Grievance Settlement Board to obtain the relief he was ultimately seeking. The complainant did in fact attempt subsequently to challenge his discharge before that latter Board, but the Board ruled that an employee's individual right to process a grievance was extinguished once there had been a settlement of the grievance negotiated by the employee's bargaining agent, and indeed acted upon by the employer.

That brought the complainant back before this Tribunal, proceeding against the Union. The complainant testified on his own behalf, and was aided as well by the testimony of Mr. Gordon D'Eri, who was shop steward from about the time the complainant joined GO-Transit. The complainant moved with his family from Newfoundland to Ontario as a youth, and completed relatively little in the way of formal education. Separated and then divorced in the 1980's, he won a custody battle making him sole guardian and support for his emotionally-disturbed little boy, and clearly was still going through a period of considerable financial and personal stress in the months leading up to his troubles at GO-Transit. As all of the other witnesses, including Mr. D'Eri, recognized, however, the complainant also has a personal characteristic of becoming quickly and violently upset, and all of these factors together appear to limit the extent to which the complainant at

times may have had a full grasp of events as they were taking place around him, or the extent to which he is able to recall and reconstruct those events accurately in his mind. The evidence of others, for example, tells how the grievor subsequent to his termination became enraged at the suggestion that he had signed anything assigning his wages to the Credit Union, only to have had a document produced to that effect clearly bearing his signature. Similarly, before the Tribunal the complainant was adamant that the Union did nothing at all for him, including the filing of an initial grievance, only to have the said document shown to him at the hearing with what once again the complainant had to acknowledge was his signature. Mr. D'Eri, on the other hand, a man considerably senior to the complainant, and more mature and experienced, appears to have supported the complainant in his position throughout, and to have been genuinely outraged at the state the complainant was left in. Even in the case of Mr. D'Eri, however, we are troubled by his lack of recollection of a key meeting in which the Executive Board's recommendation not to proceed to arbitration on the complainant's grievance was put to the membership, when the Roll Call of that meeting produced at the request of counsel for the complainant show Mr. D'Eri clearly in attendance. In the end, however, the Tribunal would note that not a great deal turns on these problems of credibility, because on the points critical to the Tribunal's

disposition of this complaint, there is virtually no difference between the evidence of the complainant and his witness and that of the Union's two primary witnesses, John Sullivan and Michael Carter.

The material facts can be outlined quite briefly. GO-Transit employees, be it drivers who sell tickets or the regular ticket-sellers located in stations, obviously handle huge amounts of cash across the system. The employer therefore relies on deterrence to control employee theft, and it is its policy that any employee discovered misappropriating funds is dismissed, and charges are laid. The rule for drivers receiving money for tickets is that the money is to be turned in at the end of each shift. There is not always someone available to receive that money on behalf of the transit company at the end of every shift, in which case the requirement is that the money be handed in at the very next opportunity, normally at the end of the next shift. There is no dispute in the evidence but that the complainant is not particularly adept at handling money; in recognition of that, however, GO-Transit had provide him with special counselling on the cash-in procedures at least twice during the brief period of his employment. Notwithstanding that counselling, it appears that the complainant went from September to December 1985 without properly cashing in, thus accumulating unaccounted-for company funds in the amount of some 1500

dollars by the end of the year. The complainant was, as noted, under serious financial stress at the time, and allowed himself to use that extra money to defray pressing personal expenses of his own (albeit planning, in his own mind, to pay the company back when the time came). With respect to his awareness of what he was doing, the complainant concedes that he was "no angel", and that he recognized that someone in the company wasn't doing his or her job for him to be able to accumulate that amount of money without anyone raising a question. By the time of the new year, however, the complainant testified that he was beginning to get nervous, and decided to go to the company and tell all, including the fact that he had used the money to meet his own personal car expenses. The complainant did, however, couple these admissions with an offer to pay the money back immediately. Upon learning of this, the response of senior management was to fire the complainant and call the police to have him charged. The complainant was arrested without warning and taken, along with his son, to the police station, at which point Mr. D'Eri responded to his urgent request for help and arranged his release.

The company by then had followed up with its own letter of discharge, which read:

Dear Mr. Francis:

It has been brought to my attention that, by your own admission, between September 1985 and December 1985 on numerous occasions you sold from various bus ticket registers tickets valued in excess of \$1,500 as of this date, and withheld the revenue for your own personal use. You also failed to follow cash in procedures as outlined in your Driver's Manual.

Such conduct cannot and will not be condoned by GO Transit. After considering the facts concerning this matter, your employment with GO Transit is hereby terminated for just cause effective Tuesday, January 7, 1986.

Yours truly,

A. F. Leach,
Managing Director

The Union, as noted, grieved on the complainant's behalf, seeking full reinstatement with back-pay, but the company's response to the grievance was as follows:

This letter will acknowledge receipt of your January 13th grievance letter regarding your dismissal for just cause.

In view of the overwhelming evidence, your admission to misappropriation of company funds and failure to follow cash-in procedures, without prejudice, we see no purpose being served in holding a second stage grievance hearing. You may proceed to arbitration if you so desire.

By copy of this letter we are advising the Union of our decision in this matter.

By then Mr. D'Eri had put the matter in the hands of Mr. Sullivan, the bus-driver's representative on the Union's Executive Board, and a meeting took place between the three of

them at which the complainant assured Mr. Sullivan that he had made no admissions in the matter whatever. Upon full investigation both with the company and with the police, however, Mr. Sullivan learned to his dismay that that was not the truth (it may well be that in the complainant's mind the statements he had made to the company and apparently to the police as well were not viewed by him as in any way an admission of "guilt"). In any event, Mr. Sullivan, along with the Union President, Mr. Carter, again met with the complainant and confirmed with him that he wanted their help in carrying the matter further. The complainant made it clear that he did, and was advised that there was already a management-union meeting scheduled for the next week, at which the Union would raise the matter on his behalf. It was noted for the complainant, however, that if management persisted in its position denying the grievance, the complainant would have to attend at the next Executive Board meeting, the first Tuesday of the month, to speak to the matter.

Mr. Sullivan and Mr. Carter did attend that scheduled management-union meeting on January 22nd, and opened the meeting by raising the matter of the complainant's discharge. As it happened, Mr. Leach, the Managing Director of the Transit authority, was personally in attendance at that meeting, and responded that that was the employer's hard-and-fast rule, and that it was not going to permit any exceptions. Mr. Sullivan

then pressed Mr. Leach to consider the complainant's personal circumstances and hardship in this case, and to at least consider not proceeding with the criminal charges ("theft over \$1,000" in fact being an indictable offence). At the end of the discussion, Mr. Leach relented and agreed that the company would do what it could to have the criminal charges dropped, if the Union agreed that it was not proceeding with the grievance. The Union officers left the meeting without making a commitment (wishing to speak to the complainant) but clearly felt some measure of satisfaction, in light of the complainant's admissions before the company, at having gotten Mr. Leach for the first time to at least have offered not to proceed with the criminal charges.

The complainant, desperately seeking his job, however, was not interested in such a "deal". Mr. Carter and Mr. Sullivan encountered him downstairs at the company offices immediately upon leaving the meeting, and took him into one of the side boardrooms to speak to him. As it happened, the grievor had just learned that he would not be receiving funds from the company in a final paycheque because of the aforesaid assignment for default payments to the Credit Union, and was angry and upset from the beginning. When Messrs. Sullivan and Carter began explaining the company's offer to him, he "went berserk", in the words of the witnesses, and rushed first to Mr. Sullivan and then to Mr. Carter, shaking his fist in their

face and shouting that he was going to kill them. The two Union officers nonetheless persisted in asking the complainant what he wanted them to do, but the complainant responded that he "didn't give a shit" what the Union did, that he wanted no help from them, and that he would get his own lawyer and take care of it himself. Mr. D'Eri was present at that point, and agrees that that was the kind of thing the complainant might well have said. The complainant as well agrees that those were his feelings at the time, believing that neither Sullivan nor Carter had ever had the slightest intention of helping him. Asked on cross-examination whether after uttering those words he ever contacted the Union again, the complainant responded that he "knew what they were like, and that he had too much pride for that". As for Mr. D'Eri, he testified that once a matter goes to the Executive Board member, that's it for the steward, and he likewise did not raise the matter again with Carter or Sullivan.

Messrs. Carter and Sullivan did, however, raise the matter on their own at the next Executive Board meeting, and expressed the view that the company offer on the criminal charges was likely the best result the Union was likely to achieve in the circumstances. It was decided therefore to try to accomplish at least that for the complainant, and a recommendation was made to the next membership meeting to accept the company's offer. That recommendation was adopted,

and the company was advised that the Union would not be proceeding with the complainant's grievance to arbitration, on the understanding that the company would take the necessary steps to have the criminal charges withdrawn. That arrangement was confirmed by the company by letter dated February 14th as follows:

Dear Mr. Carter:

Re: R. Francis - Dismissal Grievance

Further to our February 5 conversation, this will confirm our understanding the Union will not be filing a grievance with the Grievance Settlement Board and the matter is now closed.

Mr. A. F. Leach will be sending his letter to the Metro Police requesting their consideration in this matter.

Yours truly,

"R. J. Desjardins"

Director,
Personnel, Audit & Security

The complainant's case came up for trial on June 2nd, with the Crown ready to proceed, but true to its undertaking the company had one of its representatives appear and explain that in the circumstances the company was requesting that the charge not be proceeded with; the charge was accordingly dropped, with Mr. Westman in attendance as counsel on behalf of the complainant. Two days later Mr. Westman contacted the Union and the company asking that the matter of the complainant's

discharge be re-opened. The Union indicated that it was then out of its power to do so, and that it would be up to the company to consent. The company's response was that the case was over, and would not be opened up again for review. Mr. Westman's next step was to file the present complaint.

The crux of the complaint is that the Union acted arbitrarily or in bad faith in failing to take the grievor's discharge on to arbitration. The question whether the Union erred in its judgment in accepting the offered settlement rather than taking its chances for the complainant at arbitration is itself, in light of the admissions made by he complainant to the company, the length of time over which he had knowingly withheld the company's funds, the grievor's limited seniority, and the company's consistent practice of terminating and charging employees discovered to have thus misappropriated funds, not one that could easily be characterized as arbitrary or in bad faith. But we find that we do not have to decide that question. The case is a sad one, but there are other rights besides the complainant's involved here, and at a certain point the complainant must be required to accept the responsibility for his own actions. There is no suggestion that the complainant was or is "incompetent", and the plain fact is that his last words to the Union were that he in no uncertain terms was not desirous of having their assistance, but rather was going to deal with the matter

through his own lawyer. That was the last either the company or the Union executive heard from the complainant until months afterwards when the charges against him finally were dropped. We recognize the state of mind that the complainant was in at the January 22nd meeting, and the Tribunal might well have been prepared to grant latitude to the complainant, after sober reflection, to have gone back to Mr. Carter or Mr. Sullivan and told them that he had changed his mind. But as he said, he had "too much pride" for that. Nor was he adrift with no one to turn to had he chosen to reconsider and follow up with the Union. He had, to find out for him what would have been involved, a staunch ally in the Shop steward, Mr. D'Eri, who, as the complainant himself put it, "to this day hasn't let me down".

There was, on behalf of the complainant, limited evidence given with respect to other drivers found by the company to have been late in turning in their revenues, and who were given only minor discipline for their infractions. These, however, were former drivers of Gray Coach (which the complainant was not) who had been used to turning in their revenue weekly rather than daily, and there is in any event no evidence as to the length of the period over which these drivers were in arrears. Nor is it even clear that these "discoveries" were made by the company prior to the time that the critical events surrounding the complainant were taking

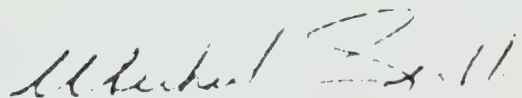
place. And finally, there is nothing in the evidence to suggest that any of these drivers had deliberately converted, or confessed to converting, the company funds to their own use. Having regard therefore to the information against the complainant that the Union officers were faced with, to company practice in dealing with misappropriations of that type, and to the complainant's unretracted instruction to the Union officers that he wished to handle his discharge on his own, we cannot find the Union's decision not to proceed to arbitration with the complainant's grievance to have been a violation of its duty under the Act.

The complaint is accordingly dismissed.

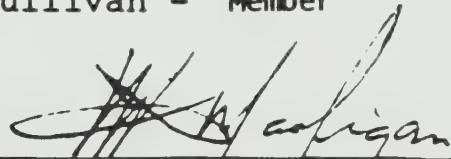
Dated at Toronto this ^{4th} day of *January*, 1990.



M. G. Mitchnick - Alternate Chairperson



M. Sullivan - Member



W. Madigan - Member

T/0027/86

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980 c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Canadian Union of Public Employees, Local 3096

Applicant

- And -

The Crown in Right of Ontario
(Ontario Housing Corporation and
All Housing Authorities)

Respondent

BEFORE:

J. H. Devlin	Vice-Chairman
W. Walsh	Member
J. H. McGivney	Member

FOR THE APPLICANT:

J. Lynd
National Representative
CUPE, Local 3096

FOR THE RESPONDENT:

J. P. Sanderson, Q.C.
Counsel
Sanderson and Laing
Barristers and Solicitors

HEARING:

April 21, 1987

This is an application pursuant to Section 40(1) of the Crown Employees Collective Bargaining Act to determine whether Pierre Sauve, the incumbent in the position of Assistant Tenant Placement Manager with the Ottawa-Carleton Regional Housing Authority is an employee within the meaning of the Act.

The function of the Tenant Placement Department is to place qualified applicants in approximately 10,500 units within the jurisdiction of the Housing Authority. The work of the Department is performed over the telephone, through correspondence, home visits and, in some cases, applicants attend at the Tenant Placement Department. Prior to June of 1986, the only member of management directly responsible for the supervision of 12 employees in the Department was Larry Thibault, the Tenant Placement Manager. Mr. Thibault had occupied this position for approximately 13 years and was three to four years away from retirement.

Since 1973, Mr. Thibault testified that there has been a large increase in the housing units available which has resulted in a corresponding increase in the volume of applicants and the number of requests for transfer. Despite this increase in workload, however, prior to the summer of 1986, the staff in the Tenant Placement Department had only been increased by two. On occasion, Mr. Thibault testified that this resulted in haphazard decision-making and lack of time to adequately search files. It also became necessary for Mr. Thibault to take work home in the

evening. As a result of the burden placed upon the Department, a review was undertaken and a decision made to establish the position of Assistant Tenant Placement Manager. Mr. Thibault testified that this position was designed to assist him in managing the Department and to assume responsibility for the supervision of six employees or, in other words, for one-half of the staff in the Department.

The sequence of events leading up to Mr. Sauve's appointment as Assistant Tenant Placement Manager are not in dispute and may be summarized briefly. On June 30, 1986, Lise Rowntree, who occupied the position of Administration Officer (Clerk 4), a job within the bargaining unit, retired. On July 2, 1986, Lynn Potvin was appointed acting Administration Officer (Clerk 4). Thereafter, in the fall of 1986, a promotional opportunity was posted for the position of Assistant Tenant Placement Manager and at the request of the Ottawa-Carleton Regional Housing Authority, this position was evaluated by the Human Resources Branch of the Ministry of Housing. The result of this evaluation was a determination that the position ought to be excluded from the bargaining unit as the incumbent would not fall within the definition of employee contained in the Crown Employees Collective Bargaining Act. Subsequently, in early November of 1986, Lynn Potvin was returned to her former position and the position of Administration Officer, Clerk 4 was deleted. Shortly thereafter, Pierre Sauve, the successful applicant, began work as the Assistant Tenant Placement Manager.

It was the position of the Union that the Assistant Tenant Placement Manager is performing the same functions which were formally performed by the Administration Officer, a job within the bargaining unit. Although the name has changed, it was contended that there has been no real change in job duties. It was the position of the Employer, on the other hand, that Mr. Sauve is employed in a managerial capacity and, therefore, is not an employee for purposes of the Crown Employees Collective Bargaining Act. In particular, the Employer relied upon Sections 1(1)(1)(iii) and (iv) of the Act which provide as follows:

1.-(1) In this Act,

...

(1) 'person employed in a managerial or confidential capacity' means a person who,

...

(iii) spends a significant portion of his time in the supervision of employees,

(iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,"

The classification standard for Clerk 4 which was the classification occupied by the Administration Officer in the

Tenant Placement Department prior to November of 1986 provides as follows:

"CLERK 4

Description

Employees in this classification perform work requiring detailed knowledge of pertinent legislation, procedures and/or legal practices. Decision making involves judgement in dealing with variations from established guidelines or standards. Employees work under general supervisor and refer only those matters to their supervisors that depart radically from established procedure.

Evaluation or assessment of a variety of statements, applications, records or similar material to check for uniformity with specific regulations, statutes or administrative orders; and, resolving issues not clearly covered are the main indicators of staff functioning at this level. Tenant Placement Officers are an example of the level of responsibility.

Staff in this classification will be required to perform some or all of the duties listed below. It is not intended to provide an exhaustive list of duties, but to note typical duties only.

Duties

Typical duties will include but not be limited to the following:

- operating a portion of an accounting section, such as, accounts payable, under the direction of an officer supervisor or financial officer
- researching housing requirements and reporting on same
- analysing and preparation of detailed statistical reports
- controlling, checking, reviewing and logging of working (engineering) drawings, specifications, plans, etc.
- providing of status reports on new buildings
- supervising a small number of clerks

Note - key factors for classification

1. performing duties requiring a detailed knowledge of related legislation, regulations, etc. as required
2. required to handle problems that vary from established guidelines

3. assessing a variety of situations to ensure uniformity with regulations, directives, etc. resolving unclear issues

Qualifications

- Grade 10, preferably Grade 12
- four years of progressively responsible clerical experience
- demonstratable (sic) written and oral communication skills
- in some positions supervisory ability is a requisite
- suitable combination of the above"

Evidence concerning the duties performed by Lise Rowntree, the Administration Officer in the Tenant Placement Department prior to June 30, 1986 was given by Gaye Durocher. Ms. Durocher worked in the Department as a Clerk Typist from August of 1984 to August of 1986 and testified that her desk was located in close proximity to that of Ms. Rowntree. At the time Ms. Rowntree retired in June of 1986, Ms. Durocher testified that the Union requested that she prepare a brief summary of the duties which Ms. Rowntree performed. Ms. Durocher also testified that the Union endeavoured to serve Ms. Rowntree with a subpoena to attend the hearing but that she was out of the country.

In respect of Ms. Rowntree's job duties, Ms. Durocher testified that Ms. Rowntree drafted correspondence relating to tenant placements and dealt with problems pertaining to the allocation of housing units. Ms. Rowntree was also involved in the preparation of affidavits of income and residency which must be completed by applicants seeking housing. In addition, Ms. Rowntree researched and composed submissions to the Local Application Review Committee, more commonly known as L.A.R.C.

submissions, which were subject to approval of the Tenant Placement Manager. Ms. Rowntree assumed the duties of the Home Visitor Co-ordinator in the absence of that employee, supervised the incumbent of the position and also dealt with queries or problems encountered by the Home Visitor working out of the office. As well, Ms. Rowntree was responsible for maintaining the filing system and was involved in the training of new employees.

Ms. Durocher testified that Ms. Rowntree acted in a supervisory capacity in relation to the Allocation Clerk, the Home Visitor Co-ordinator, the Home Visitor and two Clerk Typists, of which Ms. Durocher was one. In this capacity, Ms. Durocher testified that Ms. Rowntree scheduled lunches and breaks for employees in these positions. In addition, if employees encountered problems relating to the allocation of housing units, Ms. Durocher testified that they would often consult with Ms. Rowntree. If a problem affected the entire office, however, Mr. Thibault generally discussed the matter with Ms. Rowntree or Ms. Foley, the Tenant Placement Officer, and they, in turn, spoke to other employees in the Department.

Lynn Potvin, who occupied the position of acting Administration Officer from July to early November of 1986, testified that prior to assuming her job duties, she received some training from Ms. Rowntree. Ms. Potvin was also responsible for drafting correspondence in connection with applicants for housing units and preparing L.A.R.C. submissions. Ms. Potvin testified

that while she understood that Ms. Rowntree exercised some supervisory responsibility in relation to other employees, she did not do so. Ms. Potvin, however, did perform certain duties relating to the scheduling of employees. In November of 1986, Ms. Potvin was returned to the classification of Clerk 3 and subsequently left the Tenant Placement Department on December 31, 1986.

The job description for the position of Assistant Tenant Placement Manager provides as follows:

"

...

1. Position Title

2. Position Code

Assistant Tenant Placement Manager

MP71-201

3. Reasons for Submission

4. Supersedes Position
Code:

Number Dated

New Position

New

5. Housing Authority

Ottawa-Carleton Regional Housing Authority

6. Section

Tenant Placement

7. Location

1545 Carling Avenue, Ottawa, Ontario, K1Z 8R3

8. Title of Immediate Supervisor

9. Supervisor's Position
Code

Tenant Placement Manager

MP71-200

10. Number of Places

11. Number of Positions Supervised

1

Directly 3 Indirectly 3

12. Purpose of Position (Why does this position exist?)

To supervise the effective placement of qualified applicants in available housing units within the Ottawa-Carleton Regional Housing Authority.

13. Statement of Major Responsibilities (How is purpose achieved?)

Ensuring the effective and efficient operation of the Allocation section including applicant and tenant placements, preparation of applicant appeal submissions, continual review and up-date of applicant files, and coordination of statistical data for the department by communication, interpretation, implementation, and monitoring of allocation policies procedures.

Resolving unusual or difficult enquiries on applicant problems through interviews, or correspondence with applicants, social agencies, community leaders, and elected or appointed government officials to resolve an applicant problem or explain tenant placement policies and procedures.

Coordinating the joint City of Ottawa and OCRHA Tenant Application Processing System computer activities.

Acting as a resource person on placement policies for special groups, i.e. addressing interested groups such as Interval House, emergency housing agencies.

Supervising staff including selection, training, delegation of duties, performance assessments, and discipline.

Acting for Tenant Placement Manager during absences.

14. Qualification Criteria

- * Experience in a people-oriented organization, preferably in the administration of social housing programs.
- * Excellent writing and oral communication skills, in both official languages.
- * Excellent interpersonal skills to deal with staff, client groups, as well as senior managers.
- * Some knowledge of community social agencies and programs.
- * Experience in an EDP environment would be (sic) advantage.

15. Compensible Factors (Describe)

Knowledge

Good knowledge of related legislation, various housing programs, applicable sections of the Field Manual, Rent

Supplement Manual, OCRHA policies and procedures relating to the tenant placement function. Knowledge of applicable sections to the Family Benefits Act, Crown Personnel Manual, Data crown/Ofis Manual, the Collective Agreement, computer concepts and applications of the public housing stock. Familiarity with the services provided by other social agencies. Ability to interpret and apply policies and procedures applicable to the allocation process. Analytical ability to investigate and recommend practical solutions to complex problems. Good supervisory skills. Good oral and written communication skills, in both official languages and ability to deal tactfully with sensitive applicant problems.

Judgement

Under the general supervision of the Tenant Placement Manager, and within the guidelines for programs related to the application process and placement of applicants and tenants, judgement is used in efficiently managing staff and in interpreting and recommending changes in allocation practices to meet requirements of local circumstances. Discretion and judgement are used in counselling applicants, answering queries from community leaders, maintaining consistency of application rules and in investigating and recommending changes to policies and procedures to the Tenant Placement Manager. The position also determines priority and procedures of work to be done by staff and resolves staff problems.

Accountability

Within a Housing Authority composed of 10,638 (3,538 family, 5,079 senior citizens, and 2,021 rent supplement) situated in a large area with nine municipalities, the position is directly accountable for:

PROGRAM

- * Supervising the effective operation of the allocation section of the tenant placement program in accordance with OHC and OCRHA policies for a waiting list in excess of 2,000 applicants.
- * Advising the Tenant Placement Manager and General Manager on local changing circumstances which may effect placement practices, any contentious issues and recommending changes to policies and procedures.

FINANCIAL & MATERIAL RESOURCES

Ensuring that all records, files, agreements, and statistics are appropriately maintained and secured.

Ensure vacant units are allocated based on priority of need and within established time frames.

PERSONNEL

Directly supervising a Tenant Placement Officer and two Clerk-Typists. Indirectly supervising three Allocation Officers.

Directing and co-ordinating all tenant placement functions in the absence of the Tenant Placement Manager.

CONSEQUENCE OF ERRORS

Ineffective supervision of staff and failure to ensure units are allocated within established policies and procedures could result in appropriate and/or unfair placement of applicants or tenants in vacant units, financial loss in terms of rental revenue, adverse publicity, inquiries from elected officials and poor staff morale.

Contacts

Regular contact with senior management to provide information regarding sensitive cases. Frequent contact with property management staff regarding placement/transfer matters and with other Housing Authorities regarding applicants and transfers.

Regular contact with elected officials, social/welfare agencies, landlords, hostels, to obtain information regarding applicants, resolve problems or make referrals. Continuous contact with other public and private housing agencies to exchange information regarding applicants, former tenants, discuss trends and statistics and make referrals.

..."

With the establishment of the position of Assistant Tenant Placement Manager, both Mr. Thibault and Mr. Sauve testified that the Department was divided into two sections, one dealing with eligibility and the other with matters pertaining to the allocation of housing units. Mr. Thibault is responsible for

the Eligibility Section and the supervision of six employees while Mr. Sauve has an equivalent responsibility for the Allocation Section and supervises the remaining six employees in the Department. Mr. Sauve also testified that in Mr. Thibault's absence, he assumes responsibility for the employees in the Eligibility Section and serves as acting Tenant Placement Manager. To date, however, Mr. Sauve acknowledged that Mr. Thibault has not been absent for any prolonged period.

The function of the Allocation Section is to maintain a list of qualified applicants to whom offers of housing accommodations are made. Within the Section, Mr. Sauve assigns work to the Allocation Clerks and testified that in accordance with the system previously in place, files are allocated in alphabetical order. Mr. Sauve, however, may direct the clerks to perform specific work in relation to these files and is also responsible for assigning special projects. In addition, Mr. Sauve is consulted with some frequency by the Allocation Clerks in connection with problems which they encounter in processing files or dealing with applicants. Mr. Sauve also handles difficult inquiries and is responsible for all correspondence pertaining to allocation matters.

Both Mr. Thibault and Mr. Sauve prepare L.A.R.C. submissions and where the submission pertains to an individual already on the waiting list, the submission is generally prepared by Mr. Sauve. Mr. Sauve is also a member of the Computer Control

Committee and plays an active role in the maintenance of the Department's computer system. While training in respect of allocation matters is generally provided to new employees by Lynn Potvin, Mr. Sauve testified that he has also been involved to some extent in training and that his involvement will increase in the future, particularly in relation to the operation of the computer system.

In so far as employees in the Allocation Section are concerned, Mr. Sauve testified that he is responsible for imposing discipline although he has not had occasion to do so to date. Mr. Sauve, however, has spoken to an employee with respect to innocent absenteeism. In that case, he issued a warning to the employee concerned and indicated that if there was no improvement in the employee's attendance, he would be placed on probation. Prior to speaking to the employee, Mr. Sauve testified that he consulted Mr. Thibault and an agreement was reached with regard to the procedure to be followed.

Mr. Sauve is responsible for authorizing annual vacation leave, sick leave and other leaves as provided in the collective agreement for employees in the Allocation Section. He has also sat on interview boards for positions within the Tenant Placement Department and although there have been no grievances since he assumed the position of Assistant Tenant Placement Manager, he testified that he understood that he has been designated by the Housing Manager to hear grievances at Step 1. Mr. Sauve also

performs annual employee appraisals for the six employees in his Section and discusses each appraisal with the employee involved. Thereafter, the appraisals are placed in the employees' files in the Personnel Department. Mr. Sauve testified that he has access to the files of all six employees.

Mr. Sauve estimated that he spends approximately 50 to 60% of his time dealing with employees in the Allocation Section. Of this, 40% of his time is taken up with work-related matters such as difficult inquiries and applicant and tenant problems. The balance of this time involves supervisory functions of the nature previously described.

Mr. Sauve testified that he confers regularly with Mr. Thibault from whom he has received management training. Upon joining the Department, Mr. Sauve acknowledged that he was also provided with some training by Lynn Potvin. Mr. Sauve expressed the view that his position as Assistant Tenant Placement Manager involves first line supervision and, in fact, one of the reasons he applied for the position was because he understood that he would be working in a managerial capacity.

The issue, then, is whether Mr. Sauve as Assistant Tenant Placement Manager is an employee for purposes of the Crown Employees Collective Bargaining Act. In addressing this issue, we have considered a number of decisions to which we were referred by the parties. These consisted of Ontario Public Service Employees

Employees, Union (Welton) and The Crown in Right of Ontario File No. T 3/76; Ontario Public Service Employees Union (Bertolo) and The Crown in Right of Ontario File No. T 4/76; The Crown in Right of Ontario and Ontario Public Service Employees Union (McWilliams) File No. T 6/76; The Crown in Right of Ontario and Ontario Public Service Employees Union (Dean) File No. T 7/76; Ontario Public Service Employees Union (Bethell) and The Crown in Right of Ontario File No. 9/76; Ontario Public Service Employees Union (T. Carins, et al) and The Crown in Right of Ontario (Management Board of Cabinet) File No. T/31/81 and Corporation of The Town of Dundas and Canadian Union of Public Employees O.L.R.B. File No. 0322-86-M.

It was the submission of Mr. Sanderson, on behalf of the Employer, that as Mr. Sauve has been designated to hear grievances at Step 1, this is sufficient to find that he is excluded from the definition of employee for purposes of the Crown Employees Collective Bargaining Act. As pointed by Mr. Lynd, on behalf of the Union, however, no grievances have been filed since Mr. Sauve assumed his present position in the fall of 1986. Moreover, in this case we do not find it necessary to decide the issue solely in relation to Mr. Sauve's potential involvement in the grievance procedure. On the basis of the evidence, we are satisfied that Mr. Sauve is employed in a managerial capacity as he spends a significant portion of his time in the supervision of employees within the meaning of Section 1(1)(1) (iii) of the Crown Employees Collective Bargaining Act.

As pointed out in Ontario Public Service Employees Union

(Bethell) and The Crown in Right of Ontario, supra, Section

1(1)(1) (iii) of the Act is designed so that an individual

employed in a supervisory capacity is not placed in a position

where his identification with management's interests may be

diluted by his participation in the bargaining unit. That

decision also provides useful insight into the meaning of term

"supervision" as it is used in Section 1(1)(1) (iii) of the Act:

"We are also of the view that the term 'supervision' carries with it the managerial concepts of responsibility, effective control and independent decision making in so far as other employees are concerned. For purposes of this subsection, a person who is labelled as a 'supervisor' will not necessarily be considered a member of management merely because of that title or label. There is an obligation on the Tribunal to fully examine the duties and responsibilities of a person who is the subject matter of an application pursuant to Section 38 [now Section 40(1)] regardless of title.

Furthermore, in our view, supervision of employees does not simply mean relaying predetermined and detailed policies, practices, procedures or instructions emanating from a more senior level of management to employees in the bargaining unit. Mere implementation of decisions made by others or the mere following of a possession of orders or policies made and directed by others does not constitute supervision. A supervisor must have some latitude to exercise independent discretion vis-a-vis other employees. More particularly, that independent discretion must relate to the supervisor's authority or control over those employees. Thus, a person who merely advises or coordinates or serves as a conduit without any effective control or authority does not really supervise. In many situations, and particularly in large white collar organizations, in order to maintain a consistency, employment policies, work practices and procedures do emanate from senior management or from a central personnel office thus limiting the independence or effective authority of the front line supervisor. The scope for acting independently is further confined and limited by the collective agreement which determines

such matters as the basis for work assignments, promotions, transfers, overtime, and so forth. Thus there are severe limitations and restrictions emanating from several quarters placed on a front line supervisor.

On the other hand and despite all these considerations which tend to confine and limit the scope of a front line supervisor, there is an area of decision making and authority which may be required. Generally speaking, management needs people to direct the work force. Not every aspect of the work environment can be reduced to a predetermined policy or be governed by regulation or by a collective agreement. Nor can all the problems, difficulties, needs and requirements be anticipated in advance. In the result, there usually remains a circumscribed area where individual initiative and independent decision making may be required. It is in that shadowy area that the quality and quantity of the independent decision making or its absence must be assessed. Often it is very difficult to determine on which side of the managerial line an individual falls.

It is also our view that any determination under this section must consider the particular job and its context. No doubt it would be easier for the parties and even for the Tribunal to fix a percentage of time that would be considered 'significant' so as to reduce the cases under Section 1(1)(m)(iii) [now Section 1(1)(l) iii] to a difference revolving around the quantification of time spent in supervision. However the section individualizes the person who is the subject matter of the application by referring to 'his' time. This requires an examination of the particular duties and responsibilities of the person who we are assessing and a determination whether, if in the total context of that person's work, a significant portion of his time is spent in supervising other employees. Thus, for example, an assistant deputy minister or a director may be the person who is responsible for employee relations in a particular Ministry. The organization of the Ministry or the nature of the hierarchy may require him or her to directly supervise only one person for a very brief period during the week. The time spent may not be considerable yet the quality of the discussion may have a significant and material impact on the working lives of many, if not all the employees in the Ministry. In assessing such a situation the Tribunal must examine the full range of duties of that particular individual and determine whether in the context of all his duties and responsibilities a 'significant portion of his time' is spent in the supervision of employees."

As indicated previously, it was the position of the Union that the Assistant Tenant Placement Manager is exercising duties and responsibilities of the classification of Clerk 4 and that there has been no real change in job function. In our view, however, the evidence does not support this submission. Not only are there a number of distinctions between the classification standard for Clerk 4 and the job description for the position occupied by Mr. Sauve, but the evidence reveals that there are significant and material differences in the job duties and responsibilities of the Administration Officer and those of the Assistant Tenant Placement Manager. While we appreciate that the Union encountered some difficulty in arranging for Ms. Rowntree's attendance at the hearing, we must decide this case on the basis of the evidence introduced. That evidence reveals that Ms. Rowntree performed some duties which continue to be performed by Mr. Sauve. Like Ms. Rowntree, Mr. Sauve prepares L.A.R.C. submissions and is also consulted by other employees with respect to problems pertaining to the allocation of housing units. It would also appear that Mr. Sauve is responsible for scheduling lunches and breaks for those in his Section as did Ms. Rowntree. It is at this point, however, that the similarity ends. In our view, the evidence demonstrates that Mr. Sauve exercises that measure of independent discretion which is the mark of the individual employed in a managerial capacity. This is a discretion not previously exercised by Ms. Rowntree. Ms. Durocher acknowledged that Ms. Rowntree was not involved in granting vacation leaves and did not suggest that she was responsible for

authorizing other leaves as provided in the collective agreement. Moreover, Richard Meyer, the Chief of Finance and Administration, who joined the Housing Authority in September of 1986, testified that it was his understanding that Ms. Rowntree was not involved in matters pertaining to discipline or promotion.

As Assistant Tenant Placement Manager, Mr. Sauve spends a substantial portion of his time in what is known as professional management or, in other words, supervising employees in matters relating to the work of the Department. Mr. Sauve also spends up to 20% of his time in managerial supervision and Mr. Thibault was quite clear that in matters affecting the Allocation Section, the decision lies with Mr. Sauve. Although Mr. Sauve has not had occasion to discipline an employee, he has warned one employee with respect to innocent absenteeism. The fact that he consulted Mr. Thibault with respect to the procedure to be followed does not, in our view, detract from his position as a first line supervisor as in responding to employee shortcomings, consultation among members of management is a common occurrence. While Mr. Lynd suggested that Mr. Sauve's responsibility for authorizing leaves is circumscribed by the collective agreement, nevertheless, in many instances, there is a discretion to be exercised and, in such cases, this discretion is exercised by Mr. Sauve. As indicated previously, Mr. Sauve has also sat on promotion boards and performs annual employees appraisals. In the performance of his functions, Mr. Sauve is not closely monitored or supervised by

Mr. Thibault nor is he a mere conduit, relegated to simply relaying predetermined policies and procedures.

In the result and on the basis of the evidence as a whole, we find that Mr. Sauve exercises supervisory responsibility and engages in independent-decision-making characteristic of an individual employed in a managerial capacity. Mr. Sauve spends a significant portion of his time in the supervision of employees and is, therefore, excluded from the definition of employee by virtue of Section 1(1)(1) (iii) of The Crown Employees Collective Bargaining Act.

DATED AT TORONTO, this 24th day of July, 1987.

Jane H. Devlin

Jane H. Devlin
For the Tribunal



Ontario Public Service

Labour
Relations
Tribunal

Fonction Publique de l'Ontario

Tribunal Administratif
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CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union
(Monica Walker)

(the "Applicant")

and

The Crown in the Right of Ontario
(Ministry of the Solicitor General)

(the "Respondent")

Before:

C. Picher, Chairperson
M. Sullivan, Member
J. McGivney, Member

For the Applicant:

A. Ryder
Counsel
Gowling & Henderson
Barristers & Solicitors

For the Respondent:

R. Itenson
Chief Staff Relations Officer
Staff Relations Section
Human Resources Secretariat
Management Board of Cabinet

For Mr. J. Dempster:

M. Temple
Counsel
Rowan and Temple
Barristers and Solicitors

Hearings:

March 5, 1987
April 24, 1987

DECISION

The Union has filed a number of complaints against the Respondent Ministry involving the grievor, Ms. Monica Walker. At the time in issue, Ms. Walker was employed by the Ontario Provincial Police (O.P.P.) as a dispatcher. She worked at the detachment in Caledon from 1980 until May of 1985, at which point she transferred to the Downsview detachment. In September of 1986 she left the O.P.P.; she now works as a member of the Royal Canadian Mounted Police.

The Union has filed a complaint under section 32 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108 alleging that the Respondent has failed to comply with the terms of a settlement in T/50/84 dated December 10, 1984. The Union filed a further complaint under the Act alleging that O.P.P. Constable John Dempster, a person acting in a managerial capacity and exercising supervisory authority over the grievor, acted in breach of section 29(2)(a) and/or (c) of the Act which provides as follows:

(2) The employer or any person acting on behalf of the employer shall not,

(a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;

...

(c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or

refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act;

...

Specifically, the Union maintains that Corporal Dempster and, to a lesser extent, Corporal John Brown discriminated against Ms. Walker in her employment because Ms. Walker was exercising her right under the Act to file a grievance. Ms. Walker filed a grievance against Constable Dempster on or about March 11, 1986 alleging that he was unjustly harassing her. At the instant hearings, it was referred to as a complaint of sexual harassment.

We turn, first, to the Union's allegation that the Ministry has failed to comply with the terms of a settlement of a complaint under the Act that was entered into by the parties on December 10, 1984. The relevant portion of the settlement, that was filed with the Tribunal at that time, reads as follows:

MEMORANDUM OF SETTLEMENT

Ontario Public Service Employees Union and the
Ministry of Solicitor General

Re: T/50/84 Complaints Concerning Miss Monica Walker

Without precedent and without prejudice, the parties hereto agree to the following terms as full and final settlement of the captioned complaint:

1. The Ministry agrees to seal and sequester all of the documents pertaining to Miss Walker's performance prior to the date of this Settlement and will not refer to them in any way during the next six months. In the event that Miss Walker's performance is at a satisfactory level by the end of the sixth month from the date of this Settlement, the above-mentioned documents shall be destroyed.

...

(emphasis added)

It is common ground that Ms. Walker's performance was at a satisfactory level by June 10, 1985 and that pursuant to the terms of paragraph 1 of the settlement, all documents pertaining to Ms. Walker's performance prior to December 10, 1984 (which were to have been sealed and sequestered) should have been destroyed forthwith. The question for the Tribunal in the complaint under section 32 of the Act is whether those documents have been destroyed, i.e. whether the terms of settlement have been breached.

No one who testified had direct knowledge of the destruction of the documents. Chief Superintendent Robert Faulhafer is the Division Commander in charge of the District in which Ms. Walker worked. Chief Superintendent Faulhafer testified that while he was attempting to settle the harassment grievance he made inquiries about the destruction of the documents and satisfied himself that as of December 1985 they had been destroyed.

Chief Superintendent Faulhafer stated that the O.P.P. has three levels of files for its employees. The first, and only official file on a person, is the red jacket file which is kept in the staff services branch at the general headquarters. The second file is the staff file kept at district headquarters. The third is a file kept at the detachment where the employee is stationed. If an individual is transferred, as happened to Ms. Walker in May of 1985, from the Caledon detachment to Downsview detachment, the detachment copy of the file should follow to the new location.

When Chief Superintendent Faulhafer was trying to settle the grievance, he reviewed the red jacket copy of Ms. Walker's file and assured himself that it

contained none of the copies of the documents relating to Ms. Walker that had been ordered sealed and sequestered and subsequently destroyed. In addition, in late January of 1987 and in preparation for the instant hearing, Chief Superintendent Faulhafer obtained Ms. Walker's detachment and District headquarter files which should have been sent to general headquarters for consolidation with the red jacket file when Ms. Walker left the O.P.P. in the fall of 1986, but had remained at the District headquarters for an undetermined reason. When Chief Superintendent Faulhafer obtained these files, he extracted certain documents he considered relevant to the instant matter and destroyed the rest. Accordingly, the only remaining file is the red jacket file.

Chief Superintendent Faulhafer was unable to tell the Tribunal who had been given the responsibility for sealing and sequestering the documents relating to Ms. Walker as directed by paragraph 1 of the settlement. Moreover, he acknowledged that he did not know if copies of the material had been made before the documents were sealed or if, in fact, they had ever been sealed at all.

The Chief Superintendent stated that he thinks that the person who destroyed the documents pursuant to the settlement was Staff Sergeant McKenna, the Detachment Commander at Caledon. He could only say that he spoke to Staff Sergeant McKenna about it in the fall of 1986 and that from what he said at that time he assumed that he would have destroyed the documents before that. Chief Superintendent Faulhafer could not state, though, where or when he might have destroyed the documents. He further stated that he did not know how Mr. McKenna would have known to destroy them since, by June of 1985, Ms. Walker was at Downsview instead of Caledon. Staff Sergeant McKenna is still employed by the O.P.P. but was not called to testify.

The appearance of a particular paragraph in a memorandum written by the O.P.P. in June of 1986 caused the Union and Ms. Walker to be concerned that the documents related to her performance at Caledon prior to December 10, 1984 had not in fact been destroyed. On June 24, 1986, Inspector A.M. Wilkinson of the Professional Standards Branch wrote a memo to the Director of the Professional Standards Branch about Ms. Walker's sexual harassment complaint against Corporal Dempster. The following paragraph appears at page two of that memorandum:

While at Caledon Detachment, CRD WALKER's quality of work and association with other personnel was cause for concern. At this time, there is a complaint from Caledon against WALKER relating to her duties as a radio operator. There is (sic) also four complaints from members at Downsview Detachment in regards to her efficiency on the radio.

Chief Superintendent Faulhafer stated that he was aware of a March 18, 1985 complaint relating to Ms. Walker involving an incident on February 5, 1985, both of which would have been outside the scope of the destruction order and yet relevant to her work at Caledon. He could not, though, give evidence as to the source of the assertion in the June 24, 1986 memo that "while at Caledon Detachment, CRD Walker's quality of work and association with other personnel was cause for concern". The author of the memorandum, Inspector Wilkinson, did not testify and thus could not advise the Tribunal of the source of his assertion that Ms. Caledon's work performance at Caledon was cause for concern.

The above described paragraph in the June 24, 1986 memorandum of Inspector Wilkinson raises the real possibility that documents relating to Ms. Walker's work

performance while at Caledon in 1984/85 were still in existence in June of 1986. There was a period of time from December 10, 1984 to May of 1985 when Ms. Walker was still at Caledon and not under the protection of the December 10, 1984 settlement. The existence of any adverse reports of her work at Caledon between December 10, 1984 and May of 1985 would not suggest a breach of the settlement. It should be noted though that she was off for 2-1/2 months during this period (from February 15, 1985 to end of April, 1985) because of a car accident.

The possibility that the documents were not destroyed in accordance with the terms of the December 10, 1984 settlement is further raised by the fact that in June of 1986 the terms of a settlement of another grievance filed on behalf of Ms. Walker before the Grievance Settlement Board (file no. GSB 766/85) included once again, the destruction of the documents ordered sealed and sequestered under the December 10, 1984 memorandum of settlement. Presumably, if they had been destroyed when they were supposed to have been, there would have been little need to put the provision in the subsequent settlement.

In all of these circumstances, the Tribunal finds that the Union has raised sufficient and substantial doubt about the Ministry's compliance with the settlement and that it must look to the Ministry for clear evidence of compliance with the December 10, 1987 settlement. The Ministry, however, has produced no direct evidence of compliance with the order. Even the hearsay evidence of compliance was equivocal and uncertain. In addition, Ms. Walker had never been advised by the Ministry that either settlement order had ever been carried out. The first time she was told that they had been was at the instant hearing.

Accordingly, the Tribunal must conclude, on balance, that section 32 of the Act has been breached by the Respondent. Both parties and the grievor are directed to attend at the Tribunal for a supplementary hearing on a date set by the Tribunal. The Tribunal further directs that at that hearing the Ministry produce direct evidence of compliance with the settlement or such other evidence as is satisfactory to the Tribunal.

We turn then to the second complaint which was filed under section 29 of the Act and alleges that Corporal John Dempster and, to a lesser extent, Corporal John Brown, discriminated against and attempted to intimidate Ms. Walker because she had filed a grievance against Corporal Dempster alleging sexual harassment.

The Downsview detachment where Ms. Walker worked as a dispatcher from May of 1985 until September of 1986 when she left to work as an officer with the R.C.M.P., is divided into approximately 6 platoons of 8 to 10 members, each of which is headed by a corporal. Corporal Dempster was in charge of what was known as "B" platoon and Corporal John Brown was in charge of "C" platoon. Ms. Walker's job was to provide radio dispatch services to the members of these and other platoons in the Downsview detachment.

Inspector Donald Moore is the commander of the Downsview detachment. He testified that in January/February of 1986, he initiated an investigation of Ms. Walker's work performance because some members of one platoon (neither Corporal Dempster's nor Corporal Brown's) had expressed concerns to him about Ms. Walker's apparent failure to carry out C.P.I.C.C. (Canadian Police Information Computer Checks) requested by them. It is through C.P.I.C.C. performed by the dispatchers on their computers that

officers are advised, for example, whether an individual they have stopped on the road is wanted on a criminal charge and is driving with a valid licence. Through his investigation, Inspector Moore found the complaints against Ms. Walker to be unsubstantiated.

Inspector Moore testified that Ms. Walker first came to him on February 10, 1986 to complain about being harassed by Corporal Dempster. On March 11, 1986, she filed a grievance alleging unjust harassment by Corporal Dempster. Inspector Moore left on vacation in mid March. When he returned, he found waiting for him four letters of complaint against Ms. Walker. These were all from members of Corporal Brown's "C" platoon. The letters are each dated March 17, 1986, six days following the filing of Ms. Walker's grievance against Corporal Dempster. Each is addressed to Inspector Moore and alleges, in part, that Ms. Walker regularly failed to answer radio calls from platoon members on their first or second transmission.

The evidence reveals that the four complaints referred to above arose at a regular platoon meeting convened by Corporal Brown on March 17, 1986. Corporal Brown testified that during the course of the meeting some members of the platoon brought up complaints about Ms. Walker's work habits. Corporal Brown advised these members that, in his view, it was not an appropriate time to raise complaints about Ms. Walker. He noted that Ms. Walker had just filed a grievance against Corporal Dempster and it would look like the platoon was supporting Corporal Dempster. He advised that if complaints were to be filed, they should be careful to record facts only.

The Union argues that the four above mentioned letters were solicited by Corporal Brown in breach of the Act and should be removed from Ms. Walker's record.

The evidence satisfies the Tribunal that Corporal Brown took no action to solicit the letters in question. If anything, he sought to prevent them. Although it may seem highly coincidental that the complaints were filed only six days after Ms. Walker filed her grievance against Corporal Dempster, there is nothing in evidence to establish the source of the letters. The authors did not come to testify and thus could not be questioned as to why they chose to submit the complaints at the time they did or whether they had been asked by Corporal Brown, or any one else, to do so.

In light of the foregoing, the Tribunal concludes that Corporal Brown did nothing in breach of his obligations under the Act in respect of the platoon meeting held on March 17, 1986 or the four subsequent letters of complaint.

We turn then to the allegations against Corporal Dempster which are largely rooted in a meeting of his platoon which he convened on March 24, 1986. Three of the five constables who attended the platoon meeting called by Corporal Dempster testified to the content of the meeting.

Constable Vincent Gircys testified that at the meeting Corporal Dempster asked the five constables if they were having any problems with the C.R.O.s (civilian radio operators or dispatchers). Several platoon members commented on an earlier problem with a particular C.R.O. (not Ms. Walker) and Corporal Dempster advised that that problem had been taken care of. Corporal Dempster then asked if there were any problems with Ms. Walker, to which all constables replied that there were none. According to Constable Gircys, Corporal Dempster advised the constables that Ms. Walker was in trouble because of an incident in Caledon and that they should watch

themselves around her. He told them, according to Constable Gircys, that she was not always running CPIC checks when she was asked to.

Constable Gircys testified that some of the constables advised Corporal Dempster that he could place a supervisor in the radio room if he felt Ms. Walker was neglecting her duties. Corporal Dempster replied that such a step would not be cost effective. Constable Gircys testified that Corporal Dempster then said, "You don't understand - you can't fire someone if you don't have documentation." Constable Gircys noted that the meeting lasted one hour and that the vast majority of the time was spent on the subject of Ms. Walker. Constable Gircys testified that his impression of the meeting was that Corporal Dempster was seeking documentation against Ms. Walker in order to get her fired. He disputed the suggestion in cross-examination that Corporal Dempster's motivation in raising the issue of Ms. Walker was an overriding concern for safety.

Constable Gircys commented that several months before this meeting Corporal Dempster had told him not to speak to Ms. Walker and to run a lot of CPIC checks when she was on duty. Constable Gircys testified that he did not run extra CPIC checks and did not have any problem with Ms. Walker performing the CPIC checks he did request. Constable Gircys further testified that he had not heard any other constables complain about Ms. Walker failing to perform CPIC checks.

Constable David Blasko is another member of Corporal Dempster's "B" platoon who attended the meeting on March 24, 1986. According to Constable Blasko, Corporal Dempster stated at the meeting that Ms. Walker had filed grievances against officers at her previous detachment at Caledon and noted that she was the one who did not

answer her radio calls. He further commented that she had been observed doing homework and neglecting calls. He mentioned that a study had been done and there was evidence that at busy times, CPIC checks weren't being done. Constable Blasko testified that Corporal Dempster went on to say that the only way to get rid of a person is to have written facts set down by all those experiencing difficulty with the person. Constable Blasko testified that he had never had an occasion when Ms. Walker refused to run a CPIC check.

The final constable to testify about this meeting was Constable Robert Letts. He stated that after Corporal Dempster advised that the problem with another C.R.O. had been solved, he raised C.R.O. Walker and stated that she was "another story". Constable Letts testified that Corporal Dempster said they should start documenting Ms. Walker as documentation would be required to solve the problem. According to Constable Letts, when someone asked Corporal Dempster what the documentation would do, he replied that it was not easy to fire someone without documentation as evidence. According to Constable Letts, Corporal Dempster told them that Ms. Walker was already under investigation for an incident in Caledon and that they should watch themselves when working with her because she tended not to run all the checks she was asked to or to record radio conversations accurately. Constable Letts told Corporal Dempster that he had never had a problem with Ms. Walker save one matter which, as set out below, was not in fact a problem at all. He suggested to Corporal Dempster though that if he was concerned, he could put an NCO in the radio room; Corporal Dempster replied that they were not going to be babysitters. Constable Letts testified that when he persisted that posting a NCO in the radio room would solve the problem, Corporal Dempster replied that the only thing that would solve the problem would be firing Ms. Walker and that documentation was needed for that. Constable

Letts testified that he told Corporal Dempster at the meeting that he did not think it was right to document Ms. Walker for the purpose of firing her. Constable Letts disputed the suggestion made on cross-examination that Corporal Dempster was motivated by concerns of safety in raising the issue of Ms. Walker. He stated that he never mentioned safety in the course of the meeting. Constable Letts acknowledged in cross-examination, though, that he did not believe Corporal Dempster was asking people to provide him with false information. Constable Letts further testified that at a later date, Corporal Dempster approached him and asked him to run a lot of CPIC checks when Ms. Walker was working.

Corporal Dempster acknowledged in his testimony that he raised the issue of Ms. Walker at the March 24th meeting. He stated that he did so because two members of his platoon had mentioned incidents involving Ms. Walker which he felt were matters of safety and thus should be brought forward at the meeting. When asked by his counsel whether it was his intention to document and fire Ms. Walker, he replied that he felt if incidents occurred, they should be put on paper but that he had no authority to hire or fire.

When asked on cross-examination for the names of the two members of the platoon who had complained about Ms. Walker, he named as one, an individual who had been transferred by the time of the March 24th meeting and, as the other, Constable Letts. When asked for more details of the alleged complaints, he stated that the individual who had been transferred complained about 6 months before the meeting but that nothing had been documented. He stated that he had asked both individuals to provide documentation but that neither had. Constable Letts flatly denied that

Corporal Dempster ever asked him to document the single incident he spoke about with Corporal Dempster and rejects outright Corporal Dempster's account of it.

Corporal Dempster testified that prior to the March 1986 meeting, Constable Letts discussed a matter involving Ms. Walker with him in the presence of a Constable B.R. Rutledge. He stated that sometime in May of 1986, he asked Constable Rutledge to submit to him documentation of the conversation. He stated that he wanted such a record to show that the complaint was not a figment of his imagination but rather a serious matter involving safety. The following memorandum from Constable Rutledge to Corporal Dempster was submitted into evidence:

May 21, 1986

...

The following is in reference to our most recent conversation regarding the harassment complaint filed against you by Monica WALKER through her respective union.

In particular, the initial conversation in which you advised me of the situation and requested assistance of the Ontario Provincial Police Association and in my capacity as Secretary of No. 5 Branch, advised you accordingly.

I do not recall the date of the discussion, but at the time, Constable LETTS came into the office and subsequently entered into the conversation. He related that sometime during the past year, while on patrol, he made a query of an individual through Downsview radio and CPIC, at which time, Monika WALKER was the operator. He said she advised him quite quickly that the subject was 10-60 all clear. Sometime later he returned to the office and queried the same person again, via other means, and learned the subject was wanted for armed robbery.

He expressed his concern of the incident, and if my memory serves me, he did not make any notes or take further issue with the incident. I was quite surprised at this, considering the potential hazard

placed upon an officer, in a situation such as he described.

The above is strictly from my memory, as I was only discussing the immediate action you could take in response to the allegation against you.

"B.R. RUTLEDGE #4980
Provincial Constable

Constable Letts strongly denied the accuracy of Constable Rutledge's recitation of the conversation and asserted that he never suggested any wrongdoing by Ms. Walker. Constable Letts gave a detailed recitation of the circumstances that led to his discussion with Corporal Dempster which simply raised Ms. Walker's name but not by way of criticism. Briefly, Constable Letts stated that he stopped a vehicle on the 401 highway. The man driving the car had no identification and, as was learned later, supplied a false name. Constable Letts radioed the station for a CPIC check. Ms. Walker was the dispatcher and told him that the CPIC computer system was down so that the check could not be performed. Constable Letts issued a ticket, to the wrong person as it turned out (since the driver had given a false name), and let the person go. When Constable Letts returned to the station, he talked to Ms. Walker and the log showed that approximately 4 minutes after his call to the station, the computer came up again and the CPIC checks could again be made.

It was a couple of months later when Constable Letts learned that the ticket had been issued to the wrong person and that the actual driver was in fact wanted for armed robbery. When Constable Letts took steps to get a warrant for the arrest of the driver, he spoke to Corporal Dempster to explain the circumstances.

Constable Letts acknowledged that Constable Rutledge might have been present when he recounted the sequence of events to Corporal Dempster but strongly denied that he ever told Corporal Dempster that Ms. Walker replied "10-60", indicating that a CPIC check was done and that all was OK. He insisted that Ms. Walker simply advised him that the computer was down so that a CPIC check could not be done. He maintains that he did not say anything derogatory about Ms. Walker to Corporal Dempster or suggest that she had jeopardized his safety.

Corporal Dempster acknowledged that he never checked the radio log to find out if the computer was in fact down at the time of the alleged incident. Nor did he ever speak to Ms. Walker about the matter.

Having carefully reviewed the allegation against Corporal Dempster, the Tribunal must conclude, on the balance of probabilities, that Corporal Dempster acted in breach of his obligations under section 29 of the Act at the platoon meeting he convened on March 24, 1986. Ms. Walker, in concert with her Union, filed a grievance against Corporal Dempster on March 11, 1986, something she had a right to do under the Act. Thirteen days later, at the first platoon meeting called by Corporal Dempster following the filing of the grievance, Corporal Dempster raised alleged problems with Ms. Walker's work and asked the constables to document any incidents of complaint they might have had against Ms. Walker. The Tribunal accepts the accounts of the March 24th meeting as given by the three constables who testified. They gave their evidence in a clear and convincing manner. We conclude that any differences in their recollections results from natural variations in memory and do not reflect unreliable evidence. Moreover, their accounts were not particularly challenged in cross-

examination and, in substantial portion, were not specifically contradicted in Corporal Dempster's testimony.

The Tribunal accepts, therefore, that at the March 24th meeting, Corporal Dempster spoke adversely of Ms. Walker's work performance, stated that documentation was necessary in order to fire someone and said that the only way to solve the problem with Ms. Walker was to get rid of her. The Tribunal cannot accept that the reason Corporal Dempster sought documentation against Ms. Walker was because he had received two complaints about her which raised safety concerns he wanted to explore with the other members of the platoon. When pressed for details, it became clear that one complaint, at best, was made six months prior to the March meeting by a constable who had since been transferred. We must conclude that if Corporal Dempster was really concerned about the alleged complaint, he would have raised it with the platoon previously instead of waiting until thirteen days after Ms. Walker filed a grievance against him. In addition, the second "complaint" against Ms. Walker allegedly lodged by Constable Letts was, we conclude, groundless, and would reasonably have been known to be such by Corporal Dempster if he had taken due care.

In view of the timing of the March 24th meeting, the solicitation of documented complaints against Ms. Walker for the stated purpose of providing the foundation for a discharge, and the lack of a substantiated basis for raising concerns about Ms. Walker's work at that time, the Tribunal must conclude on the balance of probabilities that Corporal Dempster violated section 29 of the Act by seeking to discriminate against Ms. Walker and/or intimidate her because she had exercised a right under the Act to file a grievance against him.

The remedy requested by counsel for the Union for this alleged breach of the Act was a declaration of violation by Corporal Dempster, and we so declare.

We turn then to the second aspect of Ms. Walker's complaint against Corporal Dempster. Ms. Walker testified that on July 4, 1986, Corporal Dempster deliberately crossed her path in the main office area and deliberately "hip-checked" her with his revolver. She asserted that she tried to move back but that he made contact. Ms. Walker testified to a further incident of the same nature which she maintains occurred in the radio room where she worked on or about July 27, 1986. Corporal Dempster denied both allegations.

Even if the two hip check incidents occurred, we could not conclude from the evidence that they were motivated by an attempt to intimidate or discriminate against Ms. Walker for having exercised her rights under the Act. The Union has brought forward insufficient evidence to enable the Tribunal to conclude that the two alleged incidents of hip checking were done in violation of the Act. Accordingly, this aspect of the complaint filed under section 29 of the Act is hereby dismissed.

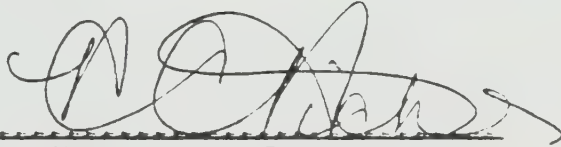
To summarize, the Tribunal finds as follows:

1. With respect to the complaint under section 32 of the Act, the Tribunal concludes that the Union has raised sufficient doubt that the Ministry has complied with the settlement dated December 10, 1984 to cause the evidentiary onus to shift to the Ministry to demonstrate compliance. As the Ministry has failed to demonstrate compliance, the Tribunal must find on the balance of probabilities that the Act has been breached. Accordingly, the Tribunal directs that both parties attend at the Tribunal for a supplementary hearing on a date set by the Tribunal. At that hearing, the Ministry will be expected to produce direct evidence of compliance with the December 10, 1984 settlement or such other evidence of compliance as is acceptable to the Tribunal;
2. With respect to the complaint filed under section 29(2) of the Act, the Tribunal finds:

- (a) that Corporal Brown did not violate the Act in respect of either a meeting held on March 17, 1986 or the four letters of alleged complaint against Ms. Walker filed by members of his platoon,
- (b) that Corporal Dempster did violate the Act during a meeting convened on March 24, 1986 by seeking to discriminate against and/or intimidate Ms. Walker for exercising her rights under the Act, and
- (c) that Corporal Dempster did not breach the Act by reason of the two alleged incidents of hip-checking.

The matter is referred to the Registrar to be scheduled for continuation to enable the Ministry to demonstrate compliance with the December 10, 1984 settlement between the parties.

DATED at Toronto this 23rd day of September, 1987.



PAMELA C. PICHER - Chairperson
For the Tribunal



Ontario Public Service

Labour
Relations
Tribunal

Fonction Publique de l'Ontario

Tribunal Administratif
des Relations
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T/0028/86-2

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T/0028/86, T/0029/86

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union
(Monica Walker)

Applicant

- and -

The Crown in Right of Ontario
(Ministry of the Solicitor General)

Respondent

Before:

P.C. Picher
M. Sullivan
J. McGivney

Chairperson
Member
Member

For the Applicant:

A. Ryder
Counsel
Gowling & Henderson
Barristers & Solicitors

For the Respondent:

R. Itenson
Staff Relations Officer
Management Board of Cabinet

For Mr. John Dempster:

M. Temple
Counsel
Rowan & Temple
Barristers & Solicitors

SUPPLEMENTARY DECISION

On June 23, 1988, the Tribunal convened a supplementary hearing to consider the Union's complaint that the Ministry had failed to fully comply with the Tribunal's Decision dated September 23, 1987. By a decision dated June 23, 1988, the Tribunal directed that the following affidavits be produced by the Respondent:

- (1) That the Ministry produce an affidavit from Staff Sergeant McKenna attesting to his knowledge of when, how and where the documents referred to in the above mentioned Memorandum of Settlement (dated December 10, 1984) in file no. T/0050/84 were destroyed; more specifically, those are the documents pertaining to Ms. Monika Walker's performance prior to December 10, 1984;
- (2) That the Ministry produce a further affidavit as to its knowledge of when, how and where the documents were sealed and sequestered pursuant to the Settlement, and the inquiries that have been made to obtain that knowledge;
- (3) That the Ministry produce a further affidavit attesting to its knowledge of whether copies of the aforementioned documents were made and the steps that have been taken to retrieve and destroy any such copies;

In response to its Direction, the Tribunal received an affidavit from Staff Sergeant McKenna dated August 3, 1988, an affidavit from Ms. Adrienne McMullin dated August 3, 1988 and a further affidavit from Ms. McMullin dated December 23, 1988. Counsel for Ms. Walker, however, maintained through a series of letters that the Ministry had not fully complied with the Tribunal's Direction. The Tribunal is in receipt of correspondence on behalf of Ms. Walker dated August 22 and December 15, 1988, January 10, February 20 and March 15, 1989 and reply correspondence from the Ministry dated December 23, 1988, February 3 and 28 and March 30, 1989.

Respecting paragraph (2) of the Tribunal's Direction and the issue of the sealing and sequestering of the documents covered by the December 10, 1986 Settlement, Staff Sergeant McKenna provided an affidavit stating that on the evening of December 10, 1984 he sealed in an envelope the original documents referred to in the Memorandum of Settlement dated December 10, 1984 and locked them in a credenza in his office at the O.P.P. Detachment in Caledon.

The Board is satisfied that Staff Sergeant's affidavit in this regard satisfies the requirements of paragraph (2) of the Tribunal's June 23, 1988 Decision.

Relating to paragraph (1), above, and the destruction of those documents, Staff Sergeant McKenna submitted an affidavit stating that he shredded the sealed documents at 5:00 p.m. on Friday, June 13, 1986 and disposed of the contents. More specifically, he stated that he shredded the original statements and supporting documentation that had been provided to him by various members of the Ontario Provincial Police concerning Ms. Walker's performance prior to the date of the Settlement of December 10, 1984 as well as the list of the persons who had submitted the documentation.

The Tribunal is satisfied that Mr. McKenna's affidavit satisfies the requirements of paragraph (1) of the Tribunal's June 23, 1988 decision.

Respecting paragraph (3) of that Tribunal's Direction, Staff Sergeant McKenna stated in his affidavit that he made a copy of the documents referred to in the December 10, 1984 Settlement for himself and Ms. Adrienne J. McMullin and that he has since destroyed his copy. He did this on June 13, 1986 at the same time as he shredded the original sealed documents. The Tribunal has been given no cause to

doubt the accuracy of Staff Sergeant McKenna's statements and concludes that his copies have been destroyed.

Further respecting paragraph (3) of the Tribunal's June 23, 1988 Direction, the Tribunal received two affidavits from Ms. McMullin indicating that she destroyed the copies she had of the documents referred to in the December 10, 1984 Settlement. In her second affidavit dated December 23, 1988, she stated that she destroyed the documents in her office shortly following the settlement of June 11, 1986. The Tribunal has been given no cause to doubt the accuracy of her assurances as set out in her affidavits and concludes that she has destroyed her copies of the relevant documents.

Counsel for Ms. Walker asserted in his letter dated August 22, 1988 that the Ministry failed to fully comply with that paragraph (3) of the Tribunal's direction relating to the existence and destruction of copies of documents that were the subject of the December 10, 1984 Settlement because, in his submission, the evidence before the Tribunal established that persons other than Staff Sergeant McKenna and Ms. McMullin, such as Chief Superintendent Faulhafer, had copies of the relevant documents.

Ms. McMullin, however, did attest to her inquiry respecting the existence of copies retained by the individuals who had originally submitted the statements referred to in the December 10, 1984 Settlement. She ascertained that only four of the individuals made copies and, moreover, that they had destroyed them.

We turn then to Chief Superintendent Faulhafer. On page 4 of the Tribunal's Decision on the merits of Ms. Walker's complaints (Decision dated September 23, 1987), the Tribunal records from the testimony of Chief Superintendent Faulhafer that "he

extracted [from Ms. Walker's files] certain documents he considered relevant to the instant matter and destroyed the rest". During the course of his testimony, Chief Superintendent Faulhafer indicated that one such document he had in his possession at the hearing was a complaint dated March 18, 1985. That document post-dates the Settlement of December 10, 1984 and thus does not fall within the ambit of the documents that were directed to be destroyed. The evidence does not establish that any of the documents Chief Superintendent Faulhafer extracted from Ms. Walker's file included documents that should have been destroyed. Inquiries as to the identity of the documents could have been the subject of cross-examination. Moreover, at the compliance hearing on June 23, 1988 which led to the Tribunal's Direction for the filing of the affidavits, the Union did not raise as a specific issue the concern that Chief Superintendent Faulhafer might be in possession of copies of documents covered by the December 10, 1984 Settlement. Accordingly, the Tribunal's Direction for affidavits respecting copies is general in scope and does not expressly direct the Ministry to file an affidavit from Chief Superintendent Faulhafer.

However, after counsel for Ms. Walker raised his concern respecting copies of the relevant documents which might possibly be in the possession of Chief Superintendent Faulhafer, Ms. McMullin, as set out in her supplementary affidavit dated December 23, 1988, spoke with C.S. Faulhafer about the matter and was advised that he had no knowledge of ever having any of the documents that should have been sealed and subsequently destroyed. Given the absence of evidence at the hearing that C.S. Faulhafer kept copies of any documents covered by the December 10, 1984 Settlement, given that the only evidence respecting the documents he retained involves a document that is dated after the December 10, 1984 Settlement, given that the Union did not expressly raise at the compliance hearing a question concerning copies Chief

Superintendent Faulhafer might have retrieved from the file for the hearing, given the assurance in Ms. McMullin's affidavit that C.S. Faulhafer advised her that he never had any of the relevant documents in his possession, and given that the affidavits of Staff Sergeant McKenna and Ms. McMullin are responsive to the Tribunal's direction in paragraph (3) respecting copies, the Tribunal concludes that the Ministry has fully complied with paragraph 3 of its June 23, 1988 Direction.

There remains, however, a final question respecting copies of the document that might have been retained by Inspector Wilkinson. In a letter to the Tribunal dated January 10, 1989, counsel for Ms. Walker specifically raised, for the first time, his concern that there was a "possibility, if not ... likelihood, that Inspector Wilkinson had obtained copies of the 'sealed' document" and that that situation "[had] not been addressed in any of the material filed in response to the Board's directive". The source of counsel's concern as described in his letter dated January 10, 1989 is the existence of a memorandum dated June 24, 1986 from Inspector Wilkinson (referred to on pp.5-6 of the Tribunal's Decision dated September 23, 1987) which raises the possibility that documents which should have been sealed in December 1984 and destroyed in June of 1985 were still in existence in 1986. Counsel requested in his January 10, 1989 submission that the Ministry ascertain from Inspector Wilkinson "the identity of the documents on which his memorandum was based, the manner in which he obtained them and their subsequent treatment". Counsel stated that "until [that] has been done, it is our [submission] that the Board's directive [in paragraph 3] has not been satisfied".

In response, the Ministry made inquiries of Inspector Wilkinson. By a letter dated February 3, 1989 to Mr. Ryder, Mr. Yan Lazor, counsel for the Ministry, confirmed that he had been advised by Ms. McMullin that she spoke with Inspector

Wilkinson on January 27, 1989, informed him of the reference to the memorandum of June 24, 1986 at pp. 5-6 of the Tribunal's decision, which is the source of the concern raised by counsel for Ms. Walker, and asked for his response. Inspector Wilkinson advised Ms. McMullin that "he never saw, nor did he have, the documents in question in this matter". Mr. Lazor was also advised by Ms. McMullin that Inspector McKenna told her on January 23, 1989 that he did not give or show Inspector Wilkinson the documents in question.

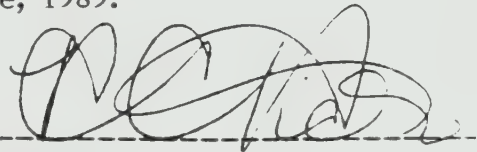
Notwithstanding the Ministry's inquiries respecting Inspector Wilkinson, counsel for Ms. Walker was not satisfied. By a letter to the Tribunal dated February 20, 1989, counsel maintained that to comply with paragraph 3 of the Tribunal's Direction the Ministry must "explain how it came about that Inspector Wilkinson received information that appeared to have come from the files of Ms. Walker that ought to have been either sequestered or destroyed under the terms of the Board's order". Finally, by letter dated March 15, 1989, counsel for Ms. Walker asserted that the failure of the Ministry to demonstrate how Inspector Wilkinson had obtained information that was contained in the sequestered and destroyed documents "discredits the affidavits so that it cannot now be said that they establish compliance with the Board's directive."

At the compliance hearing on June 23, 1988, which led to the Tribunal's Direction for affidavits, the Union did not raise as a specific issue implications allegedly arising from Inspector Wilkinson's memorandum dated June 24, 1986 as referred to on pp. 5-6 of the Tribunal's decision. Accordingly, and based on the submissions made at the compliance hearing, the Tribunal's Direction in paragraph 3 is general in scope and does not expressly direct the Ministry to file an affidavit from or on behalf of Inspector Wilkinson.

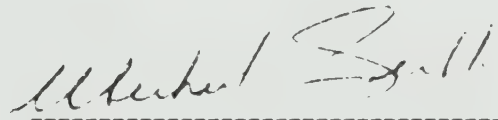
Once counsel for Ms. Walker raised his concern respecting the possibility that Inspector Wilkinson had copies of the documents in issue, the Ministry made inquiries and, as set out above, was advised that Inspector Wilkinson never saw or had the documents in issue. The Tribunal is fully satisfied that the Ministry's inquiry of Mr. Wilkinson and its affidavits constitute full compliance with paragraph 3 of the Tribunal's Direction dated September 23, 1988. We agree with counsel for the Ministry that the Union's request for further information goes beyond the Tribunal's Direction; such information is not necessary to establish full compliance with the Tribunal's Direction.

Accordingly, for the reasons set out above, the Tribunal finds that the affidavits filed by the Ministry and the Ministry's supplementary submissions constitute full compliance with the Tribunal's Direction in its June 23, 1988 Supplementary Decision.

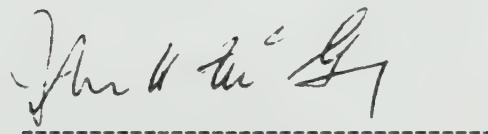
DATED at Toronto this 27th day of June, 1989.



Pamela C. Picher - Chairperson



M. Sullivan, Member



J. McGivney, Member



ONTARIO PUBLIC SERVICE

**LABOUR
RELATIONS
TRIBUNAL**

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Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0034/86

BETWEEN:

Ontario Housing Corporation Employees
Union
Local 3096 Canadian Union of Public
Employees

Complainant,

- and -

The Crown in Right of Ontario
(Ontario Housing Corporation and All
Housing Authorities)

Respondent

BEFORE:

M. G. Mitchnick
J. McGivney
E. Witthames

FOR THE COMPLAINANT:

S. Barrett
Counsel
Sack, Charney, Goldblatt and Mitchell
Barristers and Solicitors

FOR THE RESPONDENT:

C. Riggs
Counsel
Hicks Morley Hamilton Stewart Storie
Barristers and Solicitors

HEARING:

April 15, 1987
July 21, 1987

DECISION

This is an application to the Tribunal asking it to make a determination pursuant to the provisions of section 40(2) of the Crown Employees Collective Bargaining Act. That section provides:

If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under this Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes.

The present dispute arises in the context of what the parties have described in their collective agreement (Appendix C) as their "job evaluation and classification system", and the source of their dispute becomes apparent as one moves to a consideration of the sections in the Act which serve to delineate the "scope of collective bargaining". To begin with, section 18(1) of the Act provides:

Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

- (a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

- (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

(emphasis added)

Having thus enunciated what is not within the scope of collective bargaining, the Act, subject to that proscribed area, defines the authority of employee bargaining agencies in broad terms as follows:

7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18(1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits, pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development.

(emphasis added)

It should at the same time be noted in connection with the very subject matter now before us that section 18(2) provides:

-
In addition to any other rights of grievance under a collective agreement, an employee claiming,

- (a) that his position has been improperly classified;
- (b) that he has been appraised contrary to the governing principles and standards; or
- (c) that he has been disciplined or dismissed or suspended from his employment without just cause,

may process such matter in accordance with the grievance procedure provided in the collective agreement, and failing final determination under such procedure, the matter may be processed in accordance with the procedure for final determination applicable under section 19.

(emphasis added)

In addition, it should be noted that section 4(a) of the Public Service Act provides:

- 4. The (Civil Service) Commission shall,
 - (a) evaluate and classify each position on the classified service and determine the qualifications therefor ...

The facts here are simple and not in dispute, and the matter comes before us for determination effectively on the agreement of the parties. Negotiations for the

parties' 1986-87 collective agreement began in late 1985, with the union's proposals containing detailed language for a "Joint Job Evaluation Committee". The initial provisions with respect to the introduction of that Committee were as follows:

NEW ARTICLE JOINT JOB EVALUATION

- .01 Joint Job Evaluation Committee
The parties shall, within thirty (30) days following the signing of this agreement, establish a Joint Job Evaluation Committee consisting of two (2) members from the Employer and two (2) members from the Union. This Joint Committee shall have equal representation and participation from both parties.
- .02 Terms of Reference for the Joint Committee
- 1) determine the process and procedures in order to commence and complete the Job Evaluation Programme;
 - 2) perform the duties as outlined in the process and procedures to complete the program;
 - 3) develop a Weighted Point Job Evaluation Manual and determine the factors to be used and the point weightings;
 - 4) evaluate the jobs/positions using the Job Evaluation Manual as developed;
 - 5) modify manual as necessary if problems exist in evaluating jobs/positions in (4);
 - 6) develop a maintenance procedure for the programme;

- 7) make recommendations regarding implementation of the plan, including the salary structure.

The response of the employer was that the union's proposal in that form infringed the exclusive rights of management under section 18(1)(a) of the Crown Employees Collective Bargaining Act. The parties did, however, continue to negotiate over the broad issue of job evaluation and classification, with the result that the new collective agreement, when ultimately signed, contained the following Appendix C on the subject:

APPENDIX C

MEMORANDUM OF UNDERSTANDING

SUBJECT: CLASSIFICATION

The purpose of this Memorandum is to describe the relationship between the parties in respect to the negotiation of a job evaluation and classification system, that is the Classification Standards, Provincial Crown Bargaining Unit Employees.

In implementing the new classification system, it is the intention of the parties to review, update and simplify the current classification system by the development of standards to cover Group 1 (Administrative Employees) and Group 2 (Maintenance Employees).

1. The Union and the Employer will meet within ninety days from the date of signing of this Memorandum of Understanding to discuss all phases of the review and development of the classification plan for the group in question. This will include:

- a) identification of compensable factors
 - b) determination of levels
 - c) job evaluation methodology to be employed
 - d) drafting of the classification standards and/or manual
 - e) testing of the drafted standards to determine their viability for job evaluation purposes and any subsequent modification as a result of testing.
2. The Employer will provide the Union with relevant information during the review and development of the classification plans.
3. If the parties are unable to reach agreement on any aspect of the classification plan that has been developed, the matters may be referred to arbitration in accordance with the provisions of the Crown Employees Collective Bargaining Act.
4. It is understood that during the review of the job evaluation and classification system, it may be necessary to undertake standards maintenance work on current classification standards. Where such work is undertaken by the Employer, the provisions of Article 2.02 of the Collective Agreement shall continue to apply.

Pursuant to the obligation to meet further and work out the details of the classification plan for the two groups of employees, the employer subsequently tabled with the union what has come to be known as "The Blue Manual", being a comprehensive plan establishing:

CLASSIFICATION STANDARDS
FOR
PROVINCIAL CROWN BARGAINING UNIT EMPLOYEES
- ADMINISTRATIVE SUPPORT GROUP
and
- MAINTENANCE SUPPORT GROUP

Under that plan, positions in the Administrative Support Group are classified on the basis of a Factor Point Rating Plan, meaning that each position is "rated" in terms of its point value for each of the defined factors of Knowledge, Skill, Judgment, Accountability and Group Leadership. To provide a further understanding of what that process involves, the following portions of the Manual may be usefully quoted:

USE OF STANDARD

The following steps are to be taken in applying the class standards:

- (i) Study the position specification in its entirety to gain an understanding of the position as a whole. This should include a consideration of the organizational structure and location in which the position exists.
- (ii) Determine that the position meets the criteria of the Administrative Support Group. This requires reference to the group definition and the description of exclusions.

- (iii) Working from the lowest level, compare each factor in the subject position with the factor level definitions at each successive level until a "match" is identified.
- (iv) Review comparisons also with level definitions above and below the ones tentatively established for each factor. Note that, while few "match" precisely with any one level description in a factor, the use of a "best-fit" approach should enable an allocation at the appropriate level (see definition of "best-fit", following).
- (v) To appreciate more fully the relationship of the factor/level definition to a whole job, comparisons should be made to relevant Example Positions. These have been included in the Standards to exemplify the levels and to illustrate relationships among factors (see explanation of "Example Positions", following).
- (vi) Add the point values for each factor level selected to determine the total point value.

...

DETERMINATION OF CLASS LEVEL

The total value of job evaluation points assigned to the position determines the class level to which the position will be allocated. Positions which fall within a designated range of point values will be allocated to the same classification level.

...

The "ranges" and "classification levels" are then set out as follows:

LEVELS

CLASS AND POINT BANDS

<u>Class</u>	<u>Point Band</u>
ASG-1	- 165
ASG-2	166 - 199
ASG-3	200 - 244
ASG-4	245 - 289
ASG-5	290 - 349
ASG-6	350 - 414
ASG-7	415 - 459
ASG-8	460 - 524
ASG-9	525 - 599
ASG-10	600 - 699
ASG-11	700 - 800

The classification plan for the second Group, the Maintenance Support Group, adopts a different system, referred to as a "grade-description" system. Thus the Manual provides a job description for each of the five basic types of jobs involved in the Maintenance Support Group (Building Construction, Groundskeeper, Painter, etc.) and the evaluation has to determine with which of those descriptions the position being evaluated has the "best fit".

In either case, the assignment of a position (or "job") by the evaluator to the appropriate Class Level (ASG-1, ASG-2, etc. or the appropriate grade description in the Maintenance Group) establishes the relative ranking of that position within the overall framework or hierarchy of jobs within that Group. The dollar value to be assigned the position as a result of falling into that Level or grade description is of course established (and modified from time to time) through collective bargaining, and becomes part of the administration and negotiation of the parties' collective agreement (as the Manual itself makes reference to under the heading "Pay Administration Guidelines").

The parties have filed with us a letter from the Corporation to the union dated June 25, 1987 which attempts to clarify the terms of the instant dispute. That letter begins as follows:

Further to our meeting of June 11, 1987, this will confirm the Ontario Housing Corporation's position on the above noted Tribunal complaint dated January 5, 1987.

From the beginning of negotiations on November 14, 1985, we have maintained a consistent position that Job Evaluation is not negotiable. In addition, we have also maintained that the classification system is not covered within the scope of collective

bargaining as expressed in Section 18(1) of the Crown Employees Collective Bargaining Act.

Had the letter stopped there, we would have had some difficulty with that sweeping a statement of the employer's position. The letter does, however, go on to delineate the specific areas of the job evaluation system which the employer feels are reserved to itself, in the following terms:

In view of the foregoing, we would respectfully submit that the developing and preparing of the job description, along with the subsequent evaluation process used to determine the level of the position, are exclusive functions of the Employer.

Expanding upon that, Mr. Riggs at the hearing provided a breakdown of what the employer sees as the various elements or tasks of a job evaluation system as follows:

- 1) Determination (i.e. selection) of the basic classification and job evaluation system
- 2) Establishing the machinery
- 3) Determining job content
- 4) Drawing up the job description
- 5) Classification of positions
- 6) Determination of pay
- 7) Introduction of new classifications.

Category number 6, as already noted, clearly is a matter for collective bargaining. Mr. Riggs acknowledges that, on the basis of the case law, categories 1 and 2 are now clearly matters for collective bargaining as well. Mr. Riggs adds

that that is precisely why "The Blue Manual" was tabled with the union for discussion, and that if there is anything in the Manual that the union is unhappy with, the employer is ready and willing to treat such items as "negotiable". When it comes to applying the system, once agreed upon, to specific jobs, however, the employer says that is the area reserved by section 18 of the Act to management. Category number 3, "determining job content", although obviously a necessary first step, is in fact a matter which might more accurately be said to precede and fall outside the specific question of job evaluation and classification, but the union in any event concedes that that function falls solely within the purview of management. The only issues in this case, therefore, are over categories 4 and 5, the drafting of the job descriptions, and the final subjective act of evaluating or actually slotting the positions on the basis of the rules established by the parties' system (which we take to be the meaning that Mr. Riggs would attribute to his item #5, the "classification of positions").

Dealing with those latter issues, this is not a case, as Mr. Barrett notes, of "first impression". Indeed, a comprehensive examination of these very questions took place before the Tribunal in a 1979 case which not only involved the Ontario Housing Corporation and its CUPE Local 767, but was combined, in order to fully canvass the issue, with a similar case involving the Ontario Public Service

Employees Union (being cases T/7/78 and T/9/78). The employer at that time was essentially using the "grade description" form of classification system, as is the case here with respect to the Maintenance Support Group. The full range of the Public Service was involved in that case, however, so that as a first step in the system jobs had to be allocated to one of eight broad categories (e.g., "Scientific and Professional", "Administrative", "Maintenance", etc.). There were in addition, within the public service at that time, 49 "occupational" groups which cut across the various government ministeries. And further, each such occupational group was comprised of one or more class "series", and each class series had its own complement of grade descriptions. The ultimate task of the classifier was, as here, to determine relative ranking within the series (e.g. Clerk Grade 1, Clerk Grade 2, etc.) by slotting each particular job assigned to the series into the "grade description" that the classifier felt best matched it. This process is summarized and set out at page 4 of the decision:

Thus, in summary, once a new job is described the classifier will then determine the appropriate occupational category. To take the example of a newly created job, the classifier would initially identify it as coming within the Scientific and Professional category. The classifier would next identify the most appropriate class series and would then compare the job description with the narrative in the various class standards. Once the comparison is made and the job description matched with the description in the class standard, the position is classified.

Because that was the first case to deal with it, the issues in that early case included the broad right of the trade unions to propose any changes at all to the job evaluation system in use by the employer. In addition, however, OPSEU sought to have the employer adopt the union's own proposal for the grouping of classifications into grades. CUPE, on the other hand, sought the right to play a role in the manner in which jobs, once established by the employer, were described.

The Tribunal dealt with the matter first in broad terms by noting that the prior legislation had made both "classification" and "job evaluation system" categories that fell within the exclusive function of the employer, and that the amended Act (in its current form) presented the Tribunal with the task of reconciling the exclusive right of the employer to the "classification of positions" in [what was then] section 17(1)(a), with the express right just given to the unions in [what was then] section 6 to bargain over "the classification and job evaluation system". The employer had argued that the new legislation gave the union the right to negotiate "the external framework of the system, but what is in the system or internal to the system

remains part of the exclusive function of management". On that the Tribunal wrote, commencing at page 12:

We now turn to the reference in Section 6 which allows the union to negotiate "the classification and job evaluation system ...". We do not think that those words standing alone restrict negotiability to an external system as opposed to the internal parts of a system. Apart from any special meaning to be attributed to the language used, it is our view, that the plain or normal meaning of the word "system" contemplates the totality as well as the component parts. A job classification and evaluation system is composed of interrelated components and is the sum of its many parts so that where an act is to be performed or rights are granted with respect to the system, that act or those rights are referable to both the whole and the interrelated parts. Thus it is our conclusion that where the Legislature granted the right to bargain about the classification and job evaluation system it granted the right to bargain about the whole as well as those parts that are not specifically excluded by Section 17.

...

As a practical matter, if negotiations and arbitration were limited to changing the complete system then, in our view, the amendment would have granted the union a right which is essentially illusory. We do not believe that was the intent of the Legislature in expanding the scope of negotiations.

At the same time the Tribunal observed:

Also, and in response to the employer's argument concerning the effect of The Public Service Act, it is our view that the right

given to the Commission to "evaluate and classify each position" is consistent with the employer's right under Section 17 The Crown Employees Collective Bargaining Act, to "determine the classification of positions". Both pieces of legislation appear to be consistent in protecting that right for the employer.

And with respect to the specific issues raised in the case, the Tribunal went on to write, at page 17:

The employer in the first instance has the right to organize the work force as it deems fit. It may then assign the work to a particular position and determine the work methods and procedures. Once those steps have been taken and a job description is being prepared the union has the right to bargain about the terms to be used to describe the job or the position. Once the position is described the employer again has the exclusive right to classify the position.

One of the steps which the Tribunal saw as being included in the right to "classify" in the case before it is apparent from the paragraph which precedes, and which states:

We understand that the first step in the current system is to describe a particular position. Once that position is described it is placed in an appropriate grouping or category. It is this latter process which is referred to as classifying positions. The basic or first steps in the system in our view are not matters that are immune from bargaining. Thus describing a position and the method or terms used to describe a position are bargainable matters.

That statement must be read with the Tribunal's broader statement of what is involved in the full "classification" process as set out earlier from page 4; but by including in that process the preliminary step of grouping jobs, once described, into one category or another, the majority found against the position of OPSEU that the union was entitled to play a role in that regard.

And because of that latter (and narrow) point the third member of the panel, Mr. Jeffrey Sack, offered the following dissent:

I have the misfortune to disagree with my colleagues. However, the view I take of the scheme established by the Crown Employees Collective Bargaining Act is simple and leads to only one conclusion.

In the first place, section 6 of the Act provides that the union may bargain with the employer regarding the "classification and job evaluation system". Section 17(1) of the Act reserves to the employer, however, the exclusive function to manage including the "right to determine ... (a) classification of positions". Finally, section 17(2) provides that an employee may grieve "(a) that his position has been improperly classified".

The meaning I derive from these sections, taken together, is this: that the union and the employer may bargain about the system of classifying and evaluating jobs; that the actual executive or administrative function of classifying the positions according to the system so negotiated is for the employer; and that, if an employee is dissatisfied with the employer's action, a grievance may be lodged.

In my view, and in this I agree with the majority, the parts of the system are as negotiable as the whole of the system. Thus, it would seem to me that it is open to the parties to negotiate job descriptions and classification descriptions, as well as the method of ranking or relating jobs or classifications to each other. It is indeed open to the parties to negotiate the determination of the classifications in which positions are ultimately to be classified. The only matter regarding which the parties may not negotiate is the implementation of the system since the actual function of classifying positions is left to the employer. Thus, for example, the union may not negotiate a demand that it participate with the employer in the actual function of classifying positions according to the scheme which has been negotiated.

If I may offer a graphic analogy, I would suggest the placing of eggs in an egg crate. The design of the egg crate, and the size and number of the apertures, are matters which may be negotiated. The actual function of allocating different eggs to different slots in the egg crate is an executive function for management. If the employees are not satisfied with the result, they may grieve.

(emphasis added)

We need not deal here with the specific point which separated Mr. Sack from the majority in the 1979 case: that issue of "grouping" does not arise in the present case, and was not argued before us. Apart from that narrow point of disagreement amongst the members of the panel, however,

we are able to adopt in general terms the approach of both the majority and the minority of that earlier panel, in attempting to outline the competing rights articulated by the Legislature in what are now sections 7 and 18 of the Act. The key in separating the two, it becomes clear, is to pay proper heed to the Legislature's use in section 7 of the word "system", in describing the authority given to a bargaining agent to bargain over "the classification and job evaluation system". That is the "egg carton", in Mr. Sack's analogy, into which the eggs (= jobs) must ultimately be slotted, and its make-up or structure represents the broad area that the Legislature, in its amendments, has brought within the scope of collective bargaining. The classification or job evaluation system, in other words, defines the "rules of the game", as well, as Mr. Riggs has noted, as the machinery by which those rules will be applied or administered. The party applying or administering those rules, however, and making the subjective judgments implicitly required, is, by virtue of section 18(1)(a), exclusively the employer. That is the slotting of the individual eggs, and is correctly equated in the analogy of Mr. Sack with the act of evaluating or "classifying" the positions. Mr. Barrett's attempt to confine the meaning of "classifying" to the grouping of jobs into like categories,

while appearing to find some support in the comments of the Tribunal cited from page 17 of the earlier decision, is not supported by that decision of the Tribunal read as a whole (and in particular at page 4), and is divorced from what we would take to be the more common usage of the term "classification of positions". Indeed, Appendix C to the collective agreement in this case itself is broadly titled the "Classification System", and that clearly is a system whose end is the comparative ranking of positions in the pay structure. Whether or not one includes in that evaluation process any of the preliminary steps with respect to the way in which positions are "grouped", as the majority in the early case did, and as Mr. Sack declined to do, it is clear to us that the subjective slotting or ranking of individual positions within the hierarchy of the pay structure established by the parties is what is meant by ultimately "classifying" the positions. And that, again, is reserved in section 18(1) to the employer.

Clearly that slotting of the positions, as we noted earlier, has a direct impact on the actual remuneration that an employee will receive. But the Legislature has not, as Mr. Barrett postulates, abandoned the employee at that critical point and left his remuneration to be manipulated at the unfettered discretion of the employer: on the contrary, having granted to the employer in section 18(1) the unilateral right to initially

determine the classification of positions in its organization, the Legislature, as noted in the earlier case, then provided the express right to grieve the correctness of that determination not only to the union, but to individual employees as well. And what those claims that the employee has been "wrongly classified" normally deal with is not whether the employee has been placed in the proper grouping or series (although that may be an issue) but rather whether he or she has been appropriately ranked, for example, as a Grade 2 rather than a Grade 3 within that series. Further, such right to grieve, as the cases before the Grievance Settlement Board make clear, provides a full scope of review and redress, including consideration of the accuracy of the job description, and even the ordering of a new classification where the need is made out. See, e.g. the Baldwin decision, issued by the Grievance Settlement Board on April 10, 1987, and OPSEU (Berry) v. Crown In Right of the Province (decision of the Divisional Court issued March 13, 1986). It may be that the drafting of individual job descriptions (as opposed to the standards) could fall without undue hardship on the "management" side of the line, in light of the tests enunciated earlier and the full right to grieve their accuracy; but the Tribunal having clearly decided in 1979 that that element of the process was negotiable, and having re-affirmed that in 1985 (see T/09/85, Toronto Area Transit Operating Authority), we see no obvious reason to depart from that conclusion.

Mr. Barrett relies on a more recent case of the Tribunal, T/40A/84, the Workers' Compensation Board and CUPE Local 1750, to cast doubt upon the result that would appear to flow from the 1979 decision, and in particular on the finding that the final act of evaluating or "slotting" the individual positions in accordance with the system is not a joint one. That case, however, must fairly be read in the context in which it arose, and to do that, a somewhat abridged recitation of its history is in order.

In that case the parties had in their collective agreement an Article providing for a joint committee to deal with the job evaluation system and further providing that any dispute between the parties could be referred to an arbitrator jointly appointed by the parties. Subsequent to the inclusion of that provision in the collective agreement the employer asserted its exclusive rights under [now] section 18 of the Act, and in 1979 a board of arbitration chaired by Dean Stanley Beck appointed Mr. Ted Weatherill "to make a determination as to whether or not the collective agreement should contain provisions relating to a job evaluation system, and what those provisions should be". The Worker's Compensation Board objected to Mr. Weatherill's jurisdiction to make those determinations, but Mr. Weatherill, in an award dated February 4, 1980, found

that he did have jurisdiction on the basis of the arbitration awards which appointed him. At that point, as a decision of the Tribunal (dated January 4, 1982) was to put it later: "Faced with that knowledge of section 40 of the Act and its clear right to have the Tribunal deal with the matter, the employer elected to proceed before Mr. Weatherill. It chose not to come to the Tribunal or to have Mr. Weatherill's interim decision reviewed by the Court."

In the subsequent proceeding before Mr. Weatherill, the employer raised a number of specific objections to the union's job evaluation proposal, as well, once again, as the jurisdictional ones. In particular the employer objected to a clause in the body of the union's proposal which appears to have called for the final job evaluation itself to be carried out on a joint basis. Mr. Weatherill noted that he had heard and rejected the jurisdictional arguments previously, and stated:

The answer to such arguments is, simply, that section 6 of The Crown Employees Collective Bargaining Act authorizes an employee organization to bargain with the employer with respect to "the classification and job evaluation system" among other things. The actual classification of a position remains, as one would expect a managerial prerogative, but it is open to the parties to negotiate with respect to a

classification and evaluation system in light of which the propriety of any classification can be judged.

That statement, in itself, appears no different than the statements cited by us earlier from the 1979 Tribunal decision, and in fact Mr. Weatherill refers to that decision as his authority. At the end of it all, however, the union's proposal was accepted virtually intact, including the provision for "joint evaluation" by the parties.

Largely because of that, it would appear, the employer took the matter to Court on judicial review. The Court, however, simply refused to deal with it, on the basis that the employer could, at the outset, have gone to the Tribunal for the very determination it was seeking. At page 8 of the decision the Court observed:

Notwithstanding its contention throughout the lengthy course of bargaining and during the various arbitration proceedings that the union's job evaluation proposal was not within the scope of collective bargaining prescribed by the Act, the WCB chose not to refer the question to the Tribunal as it was then clearly entitled to do under s. 38(2). Instead, after the arbitral process has been concluded and an adverse decision rendered on the merits, it comes here asking this Court to decide the very question the legislature intended be referred to the Tribunal for final and binding decision. The arbitrator's alleged error was not in misinterpreting the law or the Act but in finding as a jurisdictional fact that this job evaluation proposal was within the scope of collective

bargaining under s. 6 and not excluded therefrom by s. 17(1).

Whether clause 23 [not cited] may be properly described as a "classification of positions" under s. 17(1) as opposed to or contrasted with a "classification and job evaluation system" under s. 6 is not readily apparent and, manifestly, is the kind of issue which can best be determined by the specialized Tribunal created by the legislature to deal with such questions....

Judicial review is, of course, a discretionary remedy. In the circumstances here, and having particular regard to the availability to the WCB throughout the lengthy history of this matter of a speedy and efficacious means of resolving the issues raised by it, it is our view that this is a proper case in which to impose a discretionary bar and refuse to entertain this application for judicial review: Re Harelkin v. The University of Regina, [1979] 2 S.C.R. 561.

The employer then tried to take the matter before the Tribunal, but the Tribunal, in the January 1982 decision adverted to earlier, decided that it was simply too late in the day for that. At page 7:

It is now too late; bargaining is completed and so are the proceedings before the Board of arbitration, and the employer has, by its conduct, in effect waived its right to proceed to the Tribunal. It has elected to have the board of arbitration decide the very question that it could have had the Tribunal decide.

Subsequently, the employer participated with the union in the development of the job evaluation program up to a point, but then again balked at the union playing a joint

role in certain aspects of the program, one of which, again, was the question of the application of the factor weights and points available under the system to the actual positions themselves. That again brought the matter before the arbitrator who had been appointed under the system, Mr. Weatherill. Mr. Weatherill began by noting that he viewed this as essentially the same jurisdictional question that the employer had unsuccessfully raised before him earlier. With that in mind, the learned arbitrator went on to state that the issue he saw before him was the broad one of "whether or not the job evaluation system might be the subject of collective bargaining" (page 9 of the award, issued October 6, 1983). And he noted that that issue had already been determined by him (as it had in the benchmark case before the Tribunal in 1979). Thus the arbitrator ruled that the job evaluation program had properly been included in the collective agreement, and that as a matter of pure contract interpretation, the union's role was clearly spelled out to encompass all aspects of the job evaluation process.

Once again, therefore, in the circumstances before him, the learned arbitrator declined to make any distinction between the negotiation of the job evaluation process itself (i.e., the framework), and its application to specific jobs in the

employer's organization. But the arbitrator's closing words, with which we agree, appear once again to be consonant with the views expressed in that 1979 Tribunal decision:

To contend that the provisions in question are "unclear" with respect to the role of the union representatives, in that their exercise of any significant role may be thought to impinge on the employer's exclusive function in the classification of positions under section 18(1) of the act is, in effect, to re-argue an issue already decided. To the extent that it may be thought that the performance by the union representatives on the committee of the role contemplated for them by the agreement would be "illegal", it would by my view that it would not be so. While section 18(1) provides that it shall be the exclusive function of the employer to determine "classification of positions", the exercise of that function is nevertheless to be understood in the light of other provisions of the Act itself. Section 7, of courses, authorizes the employee organization to bargain in respect of "the classification and job evaluation system", and the present collective agreement now embodies such a system. It is one in which union representatives participate. And while the employer may determine "classification of positions" as a managerial function under section 18(1), such determinations are subject to an employee's right to grieve "that his position has been improperly classified", pursuant to section 18(2) of the Act. The determination of proper or improper classification (classification itself remaining a management function) may be done having regard to a classification system, and it is, I think, clear that the union may now participate in the establishment of such system.

(emphasis added)

In the result, the employer was once again denied any relief from the provisions of the job evaluation program that had already been included in the parties' collective agreement, and which had arisen out of the arbitrator's award of July 4, 1980.

The employer, however, was not yet ready to quit. With the expiry of the term of that collective agreement, the employer was back before the Tribunal to argue its jurisdictional case all over again, on the basis that it was "a new day and a new agreement", and that the Tribunal had the jurisdiction to deal with the matter. This is set out in the decision of the Tribunal dated March 22, 1985, and it is this decision which the union now relies upon in support of its present position.

This time the Tribunal, after again noting the repetitive history of the matter, stated that it felt it would best serve the long-term interests of the parties to accept jurisdiction over the matter once and for all and render a decision on the "merits". The Tribunal then continued, at pages 3 and 4:

In an earlier decision of this Tribunal (T/9/78), we determined that the union could bargain about job descriptions but not about

classification. Under Section 7 of the Act it is permissible for the union to bargain about "... the classification and job evaluation system ..." whereas under Section 18 of the Act it is the exclusive function of the employer to determine the "classification of positions".

* * *

In attempting to reconcile those two sections of the Act we indicated that in accepting or rejecting proposals put forth by the parties we would carefully scrutinize the nature and effect of these proposals. The applicable tests are set forth in our reasons in (T/32/81).

With those general comments, once again, we fully agree.

With respect to the specific W.C.B. case before it, however, the Tribunal went on to state:

In a more particular sense, and as previously indicated, we determined with respect to the issue, in this case, that it was permissible for the union to bargain about job positions.

The system in dispute uses a weighted point job evaluation which entails the description and evaluation of jobs within the bargaining unit. The methods used to evaluate the jobs are more fully set out in the Collective Agreement. We recognize that once the jobs are evaluated in accordance with the system under the agreement that the next logical step is to place jobs similarly rated within the same grouping. Once that logical step is taken the process is tantamount to classifying employees. But even though that result may appear to be egregious it does not offend the provisions of the Act or the tests that this Tribunal has enunciated in its various attempts to interpret the Act.

The union has some rights in negotiating about "the classification and job evaluation system" under Section 7 of the Act. Also the nature and effect of the language in the Collective Agreement is to deal with job positions. The logic of utilizing such a system may propel the parties to certain conclusions about classifying the jobs but that does not derogate from the basic and permissible area of negotiation (and thus arbitration) which permits the parties to negotiate about job positions. Even though the scheme may touch on classification, as long as the nature and effect of the scheme falls within the permissible area of negotiation it does not offend Section 18 of the Act.

In the result it is our view, after considering the scheme in the agreement, that the scheme is primarily concerned about job positions and does not violate the prohibited sections of the Act.

The parties before us found some difficulty in discerning the clear intent of the Tribunal especially with respect to the first full paragraph in that passage. In retrospect, we would agree that the intent is not as clear as it might be, particularly since the Tribunal in the 1979 case had expressly found that the "placement [of positions] in appropriate groupings or classifications remains with the employer" (page 14, re: OPSEU proposal). Nor is it readily apparent in the paragraphs which both precede and follow that paragraph what aspects of the job evaluation process the Tribunal was referring to when it stated that it had already determined that it was permissible for the union to bargain about "job positions". That, once again in

retrospect, does not appear to be a particularly helpful term to use in attempting to give guidance as to where the line is to be drawn between section 7 and section 18(1) of the Act. Nor, outside of the particular context in which the W.C.B. case came before the Tribunal, do we consider it appropriate, or consistent with the Tribunal's earlier jurisprudence, to assess the thrust of a union's job evaluation proposal as a non-severable "package", and either accept or reject it on that basis. As the Tribunal has consistently noted, it has the task of distinguishing the union's right in section 7 to bargain over the "classification and job evaluation system", from the right that has been reserved to management in section 18(1) with respect to the actual "classification of positions". To approve or reject a set of proposals on the basis of what they are generally about, it seems to us, raises the risk of obliterating or ignoring one statutory right or the other of the parties, depending upon the direction in which the Tribunal in its decision may ultimately be persuaded to go.

The W.C.B. case, and more specifically the employer's handling of it, had a uniqueness which, the passages quoted above demonstrate, appears to have had a role in the disposition of the employer's untimely objections before the various adjudicative bodies who were

asked to deal with them. Given that history, and the fact that the full job evaluation system under review had been made part of the collective agreement and had been functioning for some time, the reluctance of the Tribunal ultimately in 1984 to turn back the clock, and dissect the system's parts, is not surprising. Apart from that, however, it is clear that the Tribunal's general statements of principle quoted above from the 1979 decision and from pages 3 and 4 of the 1984 decision, continue to apply, and that a union's proposals with respect to the various stages of a classification or job evaluation system must be individually analyzed as to their "nature and effect".

Thus it is our conclusion that the law in this difficult area continues to be as set out in general terms in the 1979 threshold decision, particularly in terms of the elaboration set out in the minority report to that decision, which are reproduced at pages 17 and 18 of this decision. Once again, the narrow point of "grouping" jobs which divided the panel in that case is not before us, and we express no opinion about it.

From the foregoing it follows that we agree with Mr. Riggs that categories 1 and 2 on his list (set out on page 11, supra), the selection of the job evaluation or

classification system and its attributes, together with the machinery for administering it, are negotiable, as of course are the actual rates of pay which will attach to the various levels (item 6). On the basis of the decided case law, we find that number 4, drawing the job description, is "negotiable" between the parties as well. Number 3, the determination of the job content itself, however, as the parties agree, is an exclusive management function, as, we find, is number 5, the act of actually applying the system to individual positions, in order to "classify" them. And that lattermost right of the employer is, once again, subject to the ample rights reserved to the union and the employee alike under section 18(2) of the Act to grieve the correctness of that determination by the employer.

DATED at Toronto this 30th day of December, 1987.



M. G. Mitchnick
Alternate Chairman,
for the Tribunal

ONTARIO HOUSING CORPORATION
EMPLOYEES UNION LOCAL #3096
CANADIAN UNION OF PUBLIC EMPLOYEES

- and -

THE CROWN IN THE RIGHT OF ONTARIO
(Ontario Housing Corporation and
all Housing Authorities)

PARTIAL DISSENT/EDWARD C. WITTHAMES, MEMBER

I have had the opportunity to review the majority award in this matter. Again, the tribunal is faced with the difficult task of interpretation of Section 7 and 18 of CECBA.

In determining the scope of the Union's right to engage in collective bargaining, I start from the fact that collective bargaining is in the public interest, and that one should not unnecessarily restrict the right of the employees to bargain with their employer, particularly where the right to strike has been taken away. The learned chairman in his writings of the award has used the, as he calls it, useful breakdown of the various elements or tasks of the job evaluation system as stated by Mr. Riggs for the respondent. That useful breakdown detailed seven points describing the system. The dissent will deal with point number 5 as stated by Mr. Riggs, "Classification of positions".

I think that any conflict between Section 7 and Section 18 of the Act can be removed by recognizing that the terms "evaluation" and "classification", as contained in the Act, can and should be given an independent meaning. It is to be noted that in Section 18 of the Act, the employer is given the right to determine classification of positions; the employer is not, however, given the exclusive or unilateral right to evaluate the worth of positions. Given that the Act uses two separate terms, in my view they amount to two separate processes of functions.

Further, in my view an evaluation system which does not include the measuring of the worth of jobs is not an evaluation system at all.

While it may be argued, as counsel for the employer did in this case, that these two functions of evaluating and classifying positions are the same, Section 7 of the Act makes it clear that they are not, given that the Union's rights extend to bargaining with the employer about the classification and job evaluation system.

Put another way, the employer's right in Section 18 is not to determine or evaluate the worth of positions, but rather only the classification of position. The statutory language therefore, in the opinion of this board member, makes it clear that classification and evaluation are separate functions.

The term "classification", if it is to be given a meaning independent of evaluation, would in my view relate to the right of an employer to group duties and responsibilities or job functions together in various classifications, to add to the job content of existing jobs, to reassign job duties among jobs existing under a common classification, to create new jobs or job classifications, or to eliminate existing classifications or distribute job duties of old classifications over a number of new or surviving classifications. This understanding of the term classification accords with the type of management rights

given to employers in the private sector relating to job classification: see the decision of George Adams in the Corporation of Borough of Scarborough case at 10 L.A.C. (2d) 188 at p. 195. As well, in the Montfort Hospital case, 23 L.A.C. 50, the arbitration board defined the essence of the meaning of classification, based on "industrial practice generally" as "a grouping of the same or similar types of jobs under a single title" (at pp. 51/52). As that arbitration board went on to say, "Whereas one may wish to classify all those who do the jobs of painting, carpentry and electrical work within a plant as maintenance workers, it is equally as appropriate, if one so selects, to classify all those who do painting as painters".

However, in my view it is critical to recognize that the process or function of classifying jobs or positions based on work performed has nothing to do with job evaluation; indeed, it is upon the existing job classification system that a job evaluation scheme operates. It appears to this board member that in this case the Union does not challenge the job classifications determined by the employer, but takes them as given. What it attempts to do is to evaluate the worth of the classifications which have already been determined by the employer.

Point number 5 from the Riggs breakdown, "Classification of positions", seems to me to fail in keeping the distinct function of classifying and evaluating separate. Riggs says that the job evaluation system should be divided into determining the job evaluation system to be used, establishing the machinery to be used, determining the job content and drawing the job descriptions, classification of positions, determination of pay, and perhaps establishing new classifications. In my view, this breakdown has an element of slight of hand to it. While Riggs called the disputed function classification of position, in my view this is a conclusion rather than an accurate analysis. What goes on at the step which Riggs terms classification is in fact the evaluation, the rating, the ranking, or the assessment of the worth of the particular classification or job at issue. It does not involve classifying the job at all

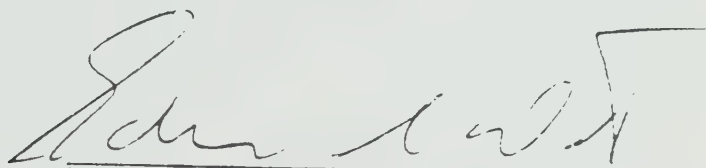
within the meaning of the Act.

The whole problem with the employer's scheme is that they improperly equate classification with evaluation, and leave all of the critical decisions with respect to job evaluation - indeed, the most critical - to be unilaterally decided by the employer. Thus, the Union may negotiate a cadillac scheme, but the employer, by ranking all employees uniformly near the bottom, would effectively gut the purpose of any job evaluation scheme.

In my opinion, it is no answer to suggest that the employee can grieve under Section 18 (2), and claim that his position has been improperly classified. As I understand classification grievances, and this member has been involved in many, they involve whether or not the grievor is performing the work of the employees in a higher classification or whether an employee in the higher classification is performing the work of the grievor. Classification grievances do not concern job evaluation or the relative work or value of a particular job. They focus entirely on the nature of the work performed. In any event, even if Section 18 (2) was capable of being used to challenge job evaluation decisions, which in my view it is not, this would be a wasteful use of the Grievance Settlement Board's time and resources. Equally important, by suggesting, in fact encouraging, the Unions to activate the grievance procedure to settle a matter which would have its roots in the evaluation in the first place, in this member's view destroys co-operation between the parties necessary for meaningful settlement negotiations.

As I have quoted at the opening of my dissent to the learned chairman's award, we are only now in dispute over the question of the "Classification of positions". I cannot see using a smoke and mirrors approach to a very deep and difficult problem. CECBA Act at Sections 7 and 18 has and will continue to cause hours of debate, trial time, re-trial time, appeal hearings, and what is really needed is a firm stand from the tribunal to clearly put the bargaining right equally on

the table for both the employer and the employees. After all, as I had stated earlier in this dissent, the employees do not have the right to strike. Therefore, this member regretfully dissents from the award.

A handwritten signature in cursive script, appearing to read "Ed W. Withames", written in dark ink.

EDWARD C. WITTHAMES, Member



Ontario Public Service
Labour
Relations
Tribunal

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Tribunal Administratif
des Relations
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416 595-0661

Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0037/86

BETWEEN:

Ontario Public Service Employees
Union

Complainant,

- and -

The Crown in Right of Ontario
(Ministry of Health, and its Agents,
Jane Taylor, Linda Artelle, John
Leibycz, Lee Heinemann and Roy
McCurley)

Respondent.

BEFORE:

M. G. Mitchnick, Alternate Chairman
D. Bonazzo, Member
J. H. McGivney, Member

FOR THE COMPLAINANT:

J. Hayes, Counsel
Cavalluzzo, Hayes and Lennon
Martin Sarra, Staff Representative
Ontario Public Service Employees
Union
George Dunn
Marcia Gillespie

FOR THE RESPONDENT:

M. Quick
Counsel
Legal Services Branch
Ministry of Health

HEARING:

June 9, 1987

DECISION

This is a complaint under section 30 of the Crown Employees Collective Bargaining Act, alleging a violation of sections 15 and 29(1) of the Act.

The complaint alleges that the employer, having unsuccessfully sought with respect to a certain group of grievances a blanket extension of time limits from the Union, attempted improperly to obtain those same extensions from the individual employee grievors themselves. The employer states in reply that, in approaching individual grievors, it was simply acting in accordance with its interpretation of the collective agreement, and that the Tribunal accordingly ought to decline jurisdiction and require the Union to file this matter with the Grievance Settlement Board, being the body normally entrusted with matters of interpretation of the parties' collective agreement.

On the jurisdictional submission, the Tribunal ruled that the question of interpreting the collective agreement, although clearly a significant issue in the proceedings, arose only tangentially to the real issue in the case from the Union's point of view, i.e., the extent of the Union's representational rights for the employees in its bargaining unit. The Tribunal noted that questions as to representation rights, and alleged employer interference with those rights, are fundamentally a part of the Tribunal's jurisdiction under the Act. Compare the decision of the Tribunal in T/36/87 and T/37/87, OPSEU v. Peter Barnes et al, released February 27, 1987.

Upon the Tribunal rendering its decision on the preliminary matter, the employer indicated that the issue of the interpretation of Article 27.15 of the collective agreement was of general concern to the Civil Service Commission, and that the Commission had a witness who would give extrinsic evidence of the common understanding of the parties' with respect to the meaning of that subsection. The employer indicated, however, that it was not in a position to proceed with that aspect of the case on the instant day, and requested an adjournment.

The Tribunal would note, as it did at the hearing, that parties to matters coming before it are ill-advised to assume that the raising of a preliminary objection will necessarily result in the Tribunal not proceeding with the merits of the case on the day scheduled for hearing. That objection is always subject to being dismissed, and it clearly is open to the Tribunal, particularly in light of the demands on its hearing schedule, to direct in that event that the matter be proceeded with on the day scheduled for that purpose.

In this particular case, however, the Union noted its interest in having the issue raised by the complaint comprehensively dealt with, and indicated that it would not oppose an adjournment to August 12, 1987, provided the following conditions were met:

(without conceding the right of any other party to intervene)

- (1) that counsel for the employer advise those with whom she has been in contact that the Tribunal is anxious that any Notice to Intervene in these proceedings be filed in a timely way;

- (2) that the employer undertook with respect to the Queen Street facility at least that prior to August 12th, no further approaches would be made to employee grievors to extend the time limits of their grievances;
- (3) that adequate particulars of any material facts upon which the employer will rely to demonstrate a common understanding of the meaning of Article 27.15 be filed with Union counsel by July 8, 1987, so as to avoid surprise and delay on August 12th;
- (4) that the employer provide Union counsel by the same July 8th date of written confirmation of those persons in management directly involved in the contact with employees over extending the time limits for their grievances.

Counsel for the employer indicated her acceptance of all of those conditions.

The Tribunal accordingly adjourned the matter to August 12, 1987.

DATED at Toronto, Ontario this 3rd day of July, 1987.



M. G. Mitchnick, Alternate Chairman
For the Tribunal



Labour
Relations
Tribunal

Tribunal Administratif
des Relations
du Travail

T/0037/86-2

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0611

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T/0037/86

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Complainant

- and -

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(Ministry of Health and its Agents,
Jane Taylor, Linda Artelle,
John Leibycz, Lee Heinemann,
Roy McCurley)

Respondent

BEFORE:

M. G. Mitchnick, Alternate Chairman
D. Bonazzo
J. H. McGivney

FOR THE COMPLAINANT:

J. Hayes
Counsel
Cavalluzzo, Hayes and Lennon
Barristers and Solicitors

FOR THE RESPONDENT:

M. Quick
Solicitor
Legal Services Branch
Ministry of Health

HEARING:

August 12, 1987

DECISION

This is a complaint of unfair labour practice filed pursuant to the provisions of section 32 of the Crown Employees Collective Bargaining Act. The substance of the complaint is that the respondents, in the face of an explicit denial by the complainant bargaining agent, OPSEU, of the extension of the time limits for processing grievances under the parties' collective agreement, attempted to obtain such an extension directly from the employees who had filed the grievances. The complainant charges that such action was a direct violation of section 29(1) of the Act, which reads:

No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The background to the actions complained of is important, and begins with the agreement between Management Board and OPSEU to merge into one Office Administration Category the former categories known as the Clerical Services Category and the Office Services Category, effective December 31, 1985. That reorganization necessarily produced a massive re-writing and review of job specifications for the various office and administrative positions of the government in order that the employer could ultimately classify each

of those positions in accordance with the Office Administration Group ("OAG") Job Evaluation Plan negotiated by the parties. In recognition of that lengthy process, the Union agreed in the Memorandum of Agreement providing for adoption of this new structure that there would be a moratorium on classification grievances until the Job Evaluation Plan had been implemented in all Ministries, in the following terms:

8. Grievances

- 8.1 The parties agree that there shall be a stay on classification grievances with respect to positions which meet the criteria for inclusion in the Office Administration Group until the Office Administration Group Job Evaluation Plan has been implemented in all Ministries.
- 8.2 In order to process classification grievances to which Article 8.1 applies, the parties agree to extend the time limits for the employer's response at Stage One until the Office Administration Group Job Evaluation Plan has been implemented in all Ministries, but not later than October 31, 1986.

(emphasis added)

This review and classification process by the employer in fact took roughly from April to December of 1986. And by December, as the final placement by the employer of positions in the new classification system was announced at the branch of government affected here, the Queen Street Mental Health Clinic, grievances by employees began to be filed. The number of grievances filed at the Clinic

ultimately rose to 60 by the end of January, affecting some 30 positions.

The normal procedure at the Mental Health Clinic for handling classification grievances is a detailed one, involving, in most cases, a comprehensive meeting with the grieving incumbent to understand his or her concerns, and to receive any additional facts about the job that the employee feels is not adequately reflected in the written job specifications. That information is then reviewed with the department manager to obtain his or her response, and to ensure that the job as described by the grievor is what the manager really has in mind for the position. All of that administration is carried out directly by the Personnel Department, which has the exclusive responsibility for matters involving the classification of positions. And at the Queen Street Mental clinic, the personnel function is carried out by only three people, the Regional Administrator for the Clinic, Linda Artelle, and two Personnel Officers, John Leibycz and Lee Heinemann. In light of that, and the number of grievances that could be expected to be forthcoming, Ms. Artelle, at the point of implementation of the new classifications in December, contacted the OPSEU staff representative for the Clinic, Martin Sarra, and inquired about the possibility of extending the time limits for dealing with an OAG classification grievances. That was

not an unusual practice between the parties, and Mr. Sarra did not appear at that stage to be unreceptive.

Subsequently, however, the processing of the many OAG classification grievances across government came to be discussed by OPSEU's Head Office, and a decision was made, in light of the delay already involved in the implementation of the Job Evaluation Plan, that there would be no further extensions granted with respect to the time limits provided for under the collective agreement (although attempts to resolve the grievances short of actual arbitration obviously could continue in the meantime). Mr. Sarra accordingly communicated that decision to Ms. Artelle in early January.

At the same time, discussions were continuing between Ms. Artelle and the President of the Local at the Clinic, Marcia Gillespie, on the creation of a structured system for dealing with the increasing number of OAG grievances in a way that might reduce the time that would be consumed on both the employer and the trade union side. In particular, Ms. Gillespie was interested in setting up an arrangement under which the two stewards that had to be involved could be scheduled off from their normal duties at the Clinic, and Ms. Artelle was amenable to that proposal. Ms. Artelle and Ms. Gillespie thus set about trying to iron out a timetable which would co-ordinate the schedules of both the stewards and the line supervisors that would have to be in attendance

at the grievance meetings. There was also apparently some discussion with Union officials at the local level, not involving Ms. Artelle, about the possible extension of time limits, and a concern was raised on the Union side that that might jeopardize an employee's rights with respect to retroactivity. When this conversation was reported to Ms. Artelle, she indicated that it was her opinion that entitlement to retroactivity could never be affected by a mutual extension of the time limits. Ms. Artelle also noted in telephone conversations with Mr. Sarra that she had been made aware of locations elsewhere in the province where leniency on time limits had been granted, and Mr. Sarra responded that he would check on it. When Mr. Sarra did check on it, he found that those extensions had been granted without the knowledge of the Union's Head Office.

The monthly meeting of the Employee-Management Relations Committee for the Clinic was held on the 20th of January, 1987, and at that meeting Mr. Sarra raised the fact that he had heard that there had been continuing discussions at the local level about possible time-limit extensions on the OAG grievances. Mr. Sarra reiterated the instructions he had received from Head Office, and the fact that extensions were therefore not to be granted. Mr. Sarra did, however, indicate to Ms. Artelle that she could write to the Local and put her concerns on the record. Mr. Sarra testified that what he was saying to Ms. Artelle was that she was free to

register her dissatisfaction through the Local, for whatever impact that might have on Head Office in terms of leading it to review the policy. Ms. Artelle, on the other hand, testified that what she thought she was getting was approval to pursue the matter of extensions with the Local. The Minutes record:

Linda Artelle stated that the Personnel Office wished to carefully review the concerns identified by employees who were dissatisfied with their new classification level and expressed a concern that the Union was unwilling to grant extensions of time limits under the Grievance Procedure. Martin Sarra responded that his Head Office had indicated that extensions should not be granted and that even so, extensions were unnecessary as it was always possible to resolve grievances in the several months prior to Arbitration.

Linda Artelle expressed a concern that there was usually a blockage of communication with the grievor after stage two of the grievance procedure by the Union. Sarra responded that this was the case normally in disciplinary rather than classification grievances. Sarra suggested that Artelle write to the Local on the issue of extensions and noted that the Employer would have to be sensitive to the Union's position that the settlement of any O.A.G. complaint/grievance would then have to be retroactive to the date of the implementation of the Office Administration Group Class Standards. Artelle and Sarra agreed that there appeared to be no way of resolving this issue. Artelle suggested a meeting involving herself, the Centre's Personnel Officers and Marcia Gillespie, Heather Liszon and Larry White from the Local to further discuss the processing of employees' complaints at the Centre. Gillespie indicated she would be amenable to such a meeting.

It was subsequently agreed at the following month's meeting that the Minutes should be amended to add:

"Sarra suggested that Artelle write to the Local on the issue of extensions...." insert "if the Employer wished to go on record concerning its dissatisfaction with the Union's position on the same and...."

-

Having set all of that out, however, it seems to us that nothing ultimately turns on that precise discussion, or the employer's understanding of it, because in fact no approval for the extension of time limits was ever granted by the Local, and the approach to the Local is not the issue here. Rather, the employer, feeling frustrated in its efforts to obtain what it considered sufficient time to investigate the grievances properly, began, following the January 20th meeting, to consider the propriety of approaching the individual grievors directly. Article 27.15, the principal provision in the collective agreement with regard to the extension of time limits, provides:

The time limits contained in this Article may be extended by agreement of the parties in writing.

However, Ms. Artelle also noted Article 27.5 of the agreement, which provides:

The employee, at his option, may be accompanied and represented by an employee representative at each stage of the grievance procedure.

That Article, to Ms. Artelle, appeared to give the employee some control over the process, and Ms. Artelle hypothesized that that control could reasonably extend to the question of

time limits. She accordingly referred that interpretation of the agreement to her Head Office for advice, and was subsequently informed that Head Office agreed with her. At the same time Mr. Leibycz, one of the Personnel Officers, looked at Article 27.1 and 27.2 of the agreement, and discerned an intent to have employee concerns dealt with expeditiously, at the informal level of the employee and the supervisor if possible. Those Articles provide:

ARTICLE 27 - GRIEVANCE PROCEDURE

- 27.1 It is the intent of this Agreement to adjust as quickly as possible any complaints or differences between the parties arising from the interpretation, application, administration or alleged contravention of this Agreement, including any question as to whether a matter is arbitrable.
- 27.2.1 An employee who believes he has a complaint or a difference shall first discuss the complaint or difference with his supervisor within twenty (20) days of first becoming aware of the complaint or difference.
- 27.2.2 If any complaint or different is not satisfactorily settled by the supervisor within seven (7) days of the discussion, it may be processed within an additional ten (10) days in the following manner:

STAGE ONE

- 27.3.1 The employee may file a grievance in writing with his supervisor. The supervisor shall give the grievor his decision in writing within seven (7) days of the submission of the grievance.

STAGE TWO

- 27.3.2 If the grievance is not resolved under Stage One, the employee may submit the grievance to the Deputy Minister or his

designee within seven (7) days of the date that he received the decision under Stage One. In the event that no decision in writing is received in accordance with the specified time limits in Stage One, the grievor may submit the grievance to the Deputy Minister or his designee within seven (7) days of the date that the supervisor was required to give his decision in writing in accordance with Stage One.

Mr. Leibycz looked as well at Article 27.13, and found further evidence of what he considered an independent role of the employee in the handling or processing of a grievance. Article 27.13 provides:

Where a grievance is not processed within the time allowed or has not been processed by the employee or the Union within the time prescribed it shall be deemed to have been withdrawn.

All of this led Mr. Leibycz to a conclusion which coincided with that endorsed by Head Office, and which Mr. Leibycz testified he communicated to Ms. Artelle.

In the result, word was passed to the managers of the Clinic that employees could be approached directly for their approval in extending the time limits on their own grievance, and Mr. Leibycz prepared wording for such a request to be submitted by the managers to the employees in writing. Such requests read:

This will acknowledge your complaint concerning the level at which your position has been classified under the new Office Administration Group Class Standards.

In accordance with Article 27.13 of the collective Agreement, I am requesting your agreement to extend the time limits for my response under Article 27.2.2 until February 13th, 1987. This extension would enable me to meet with a representative of our Regional Personnel Office to discuss your concerns and to ensure that office has a full appreciation of your position.

I would very much appreciate your cooperation in this matter.

I agree/do not agree to the above noted extension of time limits

When word of these direct approaches reached the Union office, the reaction was an angry one. Mr. Sarra telephoned Ms. Artelle and insisted that the approaches cease immediately. Ms. Artelle responded by explaining the interpretation that the employer had derived from the collective agreement, and Mr. Sarra indicated that that was not an interpretation that the Union concurred in. At the end of the conversation Ms. Artelle testified that she believed that she and Mr. Sarra had "agreed to disagree", and in her view the matter was one that would ultimately have to be determined by arbitration before the Grievance Settlement Board.

Ms. Artelle subsequent to that call had further discussions with Ms. Gillespie of the Local over the difficulty they were having working out a timetable for the stewards and supervisors under which all of the grievances could be reviewed and considered within the time limits. Ms. Artelle accordingly commented that it was too bad that an

arrangement could not be worked out which would extend the time limits. Ms. Gillespie responded: "Didn't you see Mr. Sarra's letter?" Ms. Artelle had not, but received it later that day. The letter read:

January 28, 1987

Ms. Linda Artelle
Personnel Administrator
Queen Street Mental Health Centre
1001 Queen Street West
Toronto, Ontario
M6J 1H4

Dear Ms. Artelle:

Re: Extension of Time Limits Under the
Collective Agreement

This letter is to inform you that we take your efforts to negotiate extension of time limits for O.A.G. grievances under the Collective Agreement as a serious breach.

We informed you in early January that we would not be granting extension of time limits for O.A.G. grievances at any stage and that you were to abide by the letter of the Collective Agreement. We further indicated to you at an E.E.R.C. Meeting on January 20, 1987 that no extensions would be granted by us on the time limits under the collective agreement.

We view your current actions to negotiate with individuals on time limits as a direct affront to our status as exclusive bargaining agent under the Crown Employees Collective Bargaining Act and a violation of the Collective Agreement.

We ask that you immediately cease and desist your unfair labour practice and provide this office with an immediate apology.

Yours truly,

"Martin Sarra"

Martin Sarra
Staff Representative

Upon receipt of that letter, Ms. Artelle instructed Mr. Leibycz to put an end to any direct approaches to employees immediately. Mr. Leibycz took steps to carry that instruction out, including the retrieval of a number of letters that had already been sent to the mailroom. Mr. Leibycz was not aware that certain of the managers were at the point of issuing such letters on their own, and it appears that some letters did in fact go out to employees subsequent to receipt of Mr. Sarra's letter as a result. In explaining her instruction to have all direct approaches cease immediately, Ms. Artelle testified that as long as the matter involved no more than an honest disagreement over the interpretation of the collective agreement, she was prepared to proceed and have the matter clarified for the parties at arbitration; once she saw how seriously the Union was viewing the matter, however, and that the Union was in fact treating it as an unfair labour practice, she was not prepared to continue. Ms. Artelle acknowledged, as well, that it was becoming apparent that the Union had by that time spoken to the employees, and instructed them not to consent to any extension. The Union did, in any event, file its unfair-labour-practice charge, and the matter is now before us.

The union concedes at the outset that if the employer's interpretation of the collective agreement with respect to control over time limits is correct, the complaint of unfair labour practice brought by the Union cannot succeed.

The Union submits, however, that the employer's interpretation is patently unsupportable, and that its attempt to circumvent the express position adopted by the Union on time limits, by approaching individual grievors directly, is a flagrant case of "interference" with the representational and exclusive bargaining rights of the Union. The Union argues that the very fact that the employer's position was such a carefully considered one, and represented a deliberate decision to proceed through all of the "red lights" put up by the Union, makes the case a very serious one. In light of that, the Union argues, the Tribunal ought to be loathe to give any weight to the defence of the employer that, whatever interpretation of the collective agreement is ultimately found to be the correct one, it was at all times acting in good faith in pursuit of what it perceived to be from everyone's point of view the most reasonable and effective way of working out a resolution of the many OAG grievances. Rather, the Union argues that if the employer was wrong, it is essential that it be told that it was wrong in no uncertain terms, and that to dismiss the complaint on the basis of "good intentions" or the like would be to send this and other employers within government the wrong signal.

While mentioning the case of International Wallcoverings Limited, a decision of the Ontario Labour Relations Board reported at [1983] OLRB Rep. August 1316, on the question of the "motive" requirement for Article 29(1),

the complainant is content to rely on the interpretation by that Board of the corresponding section of the Labour Relations Act in Skyline Hotels Limited, [1980] OLRB Rep. December 1811. That case noted that the Board had consistently been of the view that motive or intent was in fact an element in finding "interference" within the meaning of that unfair-labour-practice section of the Act. As the complainant notes, however, the Board went on to point out, at paragraph 56:

As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be presumed to have intended the consequences of his act: A.A.S. Communications, supra; G. W. Martin Lumber, [1980] OLRB Rep. May 737; Bank Canadian National, [1980] 1 Can. LRBR 470; Radio Officers' Union v. NLRB, (1954) 33 LRRM 2417. Once such conduct has been established, then as a practical matter (and whether or not section 79(a) of the act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. NLRB v. Great Dane Trailers, (1967) 65 LRRM 2465). It is up to the Board then, in all the circumstances, to decide what the motive of the employer really was.

The complainant acknowledges that Ms. Artelle, the primary management figure involved, is an honest and intelligent official who was simply trying to do her job as she saw it. The complainant points out, however, that Ms. Artelle is an experienced professional, and that the judgment made was a very considered one; in the circumstances,

therefore, Ms. Artelle and the employer generally must accept responsibility for the consequences of their action, which was to directly interfere with the right of the trade union to prescribe the manner in which these grievances were to be handled, as the trade union in fact had done. In particular, the complainant argues that, in light of the rights which normally accrue to a trade union to exert control over the handling of grievances, as a result of its status of exclusive bargaining agency, and in light of the absolutely clear language of the Crown Employees Collective Bargaining Act, which specifically defines "party" in section 1(1)(k) as:

"party" means the employee organization that is the bargaining agent for a bargaining unit, on the one hand, and the employer, on the other hand, and "parties" means the two of them;

the interpretation the employer purported to put on this collective agreement was simply "absurd", and lacking in any legitimacy whatever. With respect to Article 27.5 of the collective agreement, granting to individual grievors certain elective rights in the process, the complainant notes the observation of the Tribunal in the COMSOC case, (T/36/85, released February 27, 1987), that that provision is an "unusual" one within the context of labour-relations norms, and ought to be construed narrowly.

This is, of course, an unfair-labour-practice complaint, and the primary role of the Tribunal is not the interpretation of the various provisions of the collective

agreement. As we noted in our preliminary decision, issued on June 8, 1987:

The complaint alleges that the employer, having unsuccessfully sought with respect to a certain group of grievancs a blanket extension of time limits from the Union, attempted improperly to obtain those same extensions from the individual employee grievors themselves. The employer states in reply that, in approaching individual grievors, it was simply acting in accordance with its interpretation of the collective agreement, and that the Tribunal accordingly ought to decline jurisdiction and require the Union to file this matter with the Grievance Settlement Board, being the body normally entrusted with matters of interpretation of the parties' collective agreement.

On the jurisdictional submission, the Tribunal ruled that the question of interpreting the collective agreement, although clearly a significant issue in the proceedings, arose only tangentially to the real issue in the case from the Union's point of view, i.e., the extent of the Union's representational rights for the employees in its bargaining unit. The Tribunal noted that questions as to representation rights, and alleged employer interference with those rights, are fundamentally a part of the Tribunal's jurisdiction under the Act. Compare the decision of the Tribunal in T/36/87 and T/37/87, OPSEU v. Peter Barnes et al, released February 27, 1987.

As that decision noted, however, the issue of the correct interpretation of the collective agreement is nonetheless an important one to the complaint: if the employer was in fact correct in its interpretation, the Union concedes that that would put an end to this complaint.

In that regard, first of all, we would note that the employer's conclusion, that the dictates of the Union on time

limits could be ignored, and employees be approached directly, would in fact be an unusual one, in terms of labour-relations norms and the status of a union as exclusive bargaining agent. On the other hand, as the Tribunal noted in the COMSOC case, Article 27.5 is itself unusual, and is perhaps a practical reflection of the extremely large bargaining unit that the Union here is called upon to service. On those points the Tribunal noted:

The union argues that as exclusive bargaining agent it has the right to direct the employer to deal solely with it on any given matter under the collective agreement, citing a number of cases under the comparable provisions of the Labour Relations Act in support. In particular, the Ontario Labour Relations Board in Canadian Union of Operating Engineers and General Workers, (1983) O.L.R.B. Report October 1633 wrote:

The legislation vests bargaining rights in a trade union and obliges an employer to deal with the union rather than with individual employees. An employer is required by statute to deal with a spokesperson chosen by a bargaining agent - to bargain in good faith and to address grievances. But management need not acknowledge employees or their representatives; indeed, direct dealings with the work force infringe upon a union's exclusive bargaining authority.

and further in Windsor Western Hospital, (1984) O.L.R.B. Report November 1643:

The whole scheme of our Act is to reverse the imbalance that exists between individual employee and employer. The Act provides for the certification of trade unions to act as collective representative for all of those falling within a bargaining unit found to be appropriate for collective bargaining. It is clear on a reading of the Act as a whole that the right to collective representation

encompasses not only the negotiation of the collective agreement but the representation of individual employees in pursuit of or in protection of their rights under the collective agreement.

These statements of the law are not here in doubt. The problem with the Union's argument is that the grievance procedure negotiated by the bargaining agent itself provides for the employee to deal with his or her own grievance at the early stages of the grievance (nor surprisingly, given the size of the government bargaining-unit). The protection contemplated by the Act to "reverse the imbalance" is provided in section 27.5, giving the employee the absolute right to be represented by a union representative at any stage of the procedure if he or she chooses. This is not a matter of a Union "waiving" its status as exclusive bargaining agent. As exclusive bargaining agent it has freely negotiated a grievance procedure which provides both flexibility of administration and the right of employees to invoke the aid of the bargaining agent at any stage that the employees desire.

OPSEU in that case in fact sought to have the Tribunal declare Article 27.5 of its own collective agreement unlawful as being inconsistent with the Union's role as exclusive bargaining agent, in response to which the Tribunal wrote:

We do not see that the Union, particularly in a bargaining unit this large, would be well served by having us declare such provision an abandonment of its statutory mandate.

We would, on the other hand, agree with Mr. Hayes that as a matter of labour-relations policy, it is reasonable to construe an Article like 27.5 of this agreement in a strict way, according to its specific language. That Article, once again, provides:

The employee, at his option, may be accompanied and represented by an employee representative at each stage of the grievance procedure.

That language is directed specifically to the question of who it is that may accompany and represent the employee at any of the various meetings which take place under the negotiated grievance procedure, and it is precisely that question of who would be the "spokesperson" that was in dispute between the parties in the ComSoc case. There is nothing in that language to necessarily exclude the Union from its normal role as the overall co-ordinator of the grievance procedure, at least in a case where the Union has explicitly spoken on the issue, and that is the only issue which the Union is here raising with us. Thus, while we agree with Ms. Horton that there can be variations in the meaning of the word "party" under both the Act and the collective agreement, depending on the context, we find no reason to read the word "party" in Article 27.15:

The time limits contained in this Article may be extended by agreement of the parties in writing

as meaning anything other than the parties to the collective agreement. That, it seems to us, is a natural meaning for that clause and is exactly the interpretation that the employer must have put on it when it approached the Union for a blanket extension of the time limits in the first place. And if that control over time limits is not a right which the Union can exercise if it chooses, where, one would have to

wonder, would the authority come from for the Union to agree with the employer, as it did under the terms of the O.A.G. Memorandum of Agreement, for a moratorium on all grievances during the initial period that the O.A.G. Job Evaluation Plan was being implemented?

It is thus our conclusion that the Union's interpretation of the relevant provisions of the collective agreement is the appropriate one. That, however, is not an end to the matter. Given the language of this particular collective agreement, and the fact that nowhere is it stated that the clear definition of "party" given in section 1(1)(k) of the Crown Employees Collective Bargaining Act is the controlling definition of the word "party" for any collective agreement negotiated pursuant to that Act, we believe it is simply unfair to characterize the interpretation arrived at by the employer as "absurd", or, to put the matter precisely, as unworthy of belief. The evidence satisfies us, in fact, that what Ms. Artelle thought she was dealing with was simply an honest difference of opinion over the meaning of the collective agreement, to be settled one way or the other by arbitration, and that she believed that she and Mr. Sarra in their stand-off had "agreed to disagree". And in assessing the state of this particular employer's relationship with the Union, it is not without significance that the moment the Union made it clear that it viewed the matter not as a simple contract dispute but as an unfair labour practice, the

employer pulled back from its action. We recognize that the Union by that time had intervened to make it more difficult for individual consents to be obtained, but the employer clearly attempted to respond to Mr. Sarra's letter immediately, rather than even try.

It is our conclusion on all of the evidence therefore that the employer was acting in good faith in pursuit of what it believed was a lawful and legitimate operational purpose, i.e., what it saw as a more effective and efficient method of fairly dealing with the large number of OAG grievances, and not with a view to "interfering" in the relationship between OPSEU and its members. These are sophisticated institutional parties, and one would expect them to be capable, as one would in the ComSoc case referred to earlier, of reading beyond the "bottom line" of a case to determine how the various issues in dispute between the parties have been dealt with. While the Union has persuaded us, therefore, of the correctness of its position on the interpretation of the collective-agreement provisions here in dispute, the unfair-labour-practice complaint itself is, on the evidence, not made out, and is accordingly dismissed.

DATED AT TORONTO, ONTARIO THIS 2nd DAY OF DECEMBER, 1987.



M. G. Mitchnick, Alternate Chairman
for the Tribunal

